In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA, APPELLANT

v.

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION, SECURITY TRUST COMPANY, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court's memorandum and order filed December 19, 1966, and its order dismissing the complaint, filed January 10, 1967 (App. A, *infra*, pp. 8-15), are not reported.

JURISDICTION

The United States brought this action under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15

U.S.C. 4, and Section 16 of the Clayton Act, 38 Stat. 736, as amended, 15 U.S.C. 26, against appellee banks charging violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act. The order of the district court dismissing the government's complaint (App. A, *infra*, p. 15) was entered on January 10, 1967. The United States filed a notice of appeal to this Court on February 27, 1967. We invoke the jurisdiction of this Court on direct appeal under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Continental Can Co.*, 378 U.S. 441; *United States* v. *du Pont & Co.*, 353 U.S. 586.

QUESTION PRESENTED

Whether the Bank Merger Act of 1966 requires the government, in an antitrust suit challenging a bank merger, to establish not only that the merger may substantially lessen competition, but also that its anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

STATUTES INVOLVED

The pertinent portions of the Clayton Act and of the Bank Merger Act of 1966 are printed in App. E, *infra*, pp. 92-94.

STATEMENT

On April 28, 1965, two St. Louis banks, the Mercantile Trust Company National Association ("Mer-

cantile") and the Security Trust Company ("Security"), signed an agreement to merge. On the following day, they applied to the Comptroller of the Currency for approval of the transaction, as required by the Bank Merger Act of 1960, 74 Stat. 129. Pursuant to the provisions of that Act,[1] the Comptroller solicited reports concerning the proposed merger's competitive effects from the Department of Justice, the Federal Reserve Board, and the Federal Deposit Insurance Corporation (App. B, *infra*, pp. 16-50). The view of the Federal Deposit Insurance Corporation was that "there will be no significant unfavorable effect on

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[1] The Bank Merger Act of 1960 provided, in pertinent part:

> In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection.

competition either in downtown St. Louis or in the regional service area of Mercantile." The Federal Reserve Board, however, concluded that the effect of the proposed merger on competition "would be significantly adverse," and the Department of Justice that "the effect of the proposed merger may be substantially to lessen competition, or to tend to create a monopoly * * * and [it] would result in the elimination of significant competition between major factors in a relevant market." After receiving these reports, the Comptroller of the Currency, on June 24, 1965, approved the proposed merger with an opinion that stated that the merger would not significantly injure competition and would serve the need of the St. Louis community for a bigger bank (App. C, *infra*, pp. 51-81).

On July 7, 1965, the Department of Justice filed a complaint in a federal district court charging that the proposed merger might lessen competition substantially, in violation of Section 7 of the Clayton Act (15 U.S.C. 18), and that it constituted a restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. 1). The complaint (App. D, *infra*, pp. 82-92) alleged the following facts: Mercantile and Security are located across the street from each other in downtown St. Louis. Mercantile is the largest commercial bank in St. Louis. Together with its controlled subsidiary, Mercantile-Commerce, it accounts for about 31 percent of all deposits in the city. Security is the city's fifth largest commercial bank, accounting for about 4 percent of total deposits. Commercial banking in St. Louis is highly concentrated. The two

leading banks account for 56.8 percent of all deposits and 56.1 percent of all loans of the 25 banks located in the city. The merger of Mercantile and Security would increase concentration among the two largest commercial banks to the point where they would account for about 60 percent of all deposits.

On July 8, 1965, the Comptroller of the Currency intervened in the case and filed an answer. A week later the district court denied the government's motion for a stay of the merger's consummation, and the two banks merged soon thereafter.

Before the case was tried, Congress passed the Bank Merger Act of 1966. In relevant part it provides (App. E, *infra*, pp. 93-94) that a federal banking agency "shall not approve [a proposed bank merger] whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." If the agency approves the merger, "[a]ny action brought under the antitrust laws" to challenge it must be commenced within thirty days. In any such action, "the court shall review de novo the issues presented" and "the standards applied by the court shall be identical with those that the banking agencies are directed to apply." The Act also directs the courts to apply its standard in all cases that (like the present one) were pending

in court on February 21, 1966, the effective date of the Act.

The Comptroller of the Currency reconsidered the merger in light of the 1966 Act and, on September 13, 1966, issued a statement concluding that "the convenience and needs of the community served by Mercantile * * * clearly outweighs the insignificant effect which the merger of that bank with Security * * * has had or probably will have upon competition in the community, and that it is in the public interest to permit the merger of these two institutions." (App. C, *infra*, p. 82.) The Comptroller and the defendant banks then filed motions to dismiss the complaint for failure to state a cause of action, on the ground that the government's complaint did not refer to the 1966 Bank Merger Act. The district court sustained these motions on December 19, 1966. The court wrote that it "[would] not dismiss a complaint merely because it cites the wrong statute * * *," but that, since the complaint did not allege "that the anticompetitive effects of the merger are not outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community * * *" it did not allege a violation of the 1966 Bank Merger Act or "allege sufficient facts to support such violation." When the government declined to amend its complaint, the district court on January 10, 1967, ordered the complaint dismissed.

THE QUESTION IS SUBSTANTIAL

The court below dismissed the government's complaint in this case on the ground that the Bank Merger Act of 1966 requires the government to estab-

lish, as an essential element of violation of the anti-trust laws, that the adverse effects of a challenged merger are not clearly outweighed by considerations of community convenience and need.[1] Subsequently, this Court, on March 27, 1967, held in *United States* v. *First City National Bank of Houston* (No. 914, O.T. 1966) that the government is not required to make any such showing. Rather, offsetting community convenience and needs is a defense to be pleaded and proved by the defendant. In light of this decision, the error of the court below is patent and summary reversal would appear appropriate.

CONCLUSION

The judgment below should be reversed and the case remanded for further proceedings.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

THOMAS R. ASHER,
Attorney.

MARCH 1967.

[1] The district court's opinion (App. A, *infra*, pp. 3-14) makes clear that, in dismissing the complaint for failure to allege a violation of the new Bank Merger Act, the court was ruling, not that the complaint must mention the Act expressly, but that the plaintiff must allege and prove that the merger's anticompetitive effects are not clearly outweighed by considerations of community convenience and need. Statement, *supra*, p. 8; App. A, *infra*, pp. 13-14. At all events, this Court's *Houston* decision holds that the complaint in a bank merger case need not plead or mention the Bank Merger Act. Slip opinion, pp. 1-3.

APPENDIX A

I

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

No. 65C 241 (1)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION and SECURITY TRUST COMPANY, DEFENDANTS

and

COMPTROLLER OF THE CURRENCY, JAMES J. SAXON, INTERVENING DEFENDANT

MEMORANDUM AND ORDER

This matter is before the court on motion to dismiss filed by the defendant, Mercantile Trust Company National Association, and the defendant, Security Trust Company (hereinafter referred to as Banks), and motion to dismiss filed by the intervening defendant, Comptroller of the Currency (hereinafter referred to as Comptroller). The basis for both motions is failure to state a cause of action, and they were submitted to the court after oral arguments and the filing of briefs.

The Justice Department began this action to enjoin a proposed merger of the defendant Banks. The proposed merger had been approved by the Comptroller.

The complaint alleged that the proposed merger would violate Section 1 of the Sherman Act (15 USCA 1) and Section 7 of the Clayton Act (15 USCA 18), and at the same time a motion for a preliminary injunction was filed.

The Comptroller intervened and filed an answer and the defendant Banks answered. All defendants opposed the granting of the preliminary injunction. After a hearing this court denied a preliminary injunction, and the Banks thereafter completed the proposed merger.

On February 21, 1966, while the parties were pursuing discovery, the Bank Merger Act Amendment of 1966 (Public Law 89-356, hereinafter referred to as BMA-66) became law.

On September 13, 1966, the Comptroller reapproved the merger and, in so doing, stated that his reconsideration was for the purpose of complying with the standards of BMA-66.

The plaintiff has not amended its complaint since it was filed. The issue before the court is whether the complaint states a claim for relief against the defendant Banks in view of the passage of BMA-66. The pertinent parts of BMA-66 for the purpose of these motions are as follows:

"(A) section 18(c) of the Federal Deposit Insurance Act (12 USC 1828(c) is amended to read:

* * * *

"(c)(5) The responsible agency shall not approve—

"(A) any proposed merger transaction which would result in a monopoly, or which

would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

"In every case, the responsible agency shall take into consideration the financial and managerial resources and the future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

* * * * *

"(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

"(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merg-

or transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 USCA 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."

Section 2(c) of the Bank Merger Act Amendment provides:

> "(c) Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantative rule of law set forth in section 18 (c)(5) of the Federal Deposit Insurance Act, as amended by this Act."

The defendant Banks and the Comptroller admit the plaintiff's complaint when filed stated a cause of action, but contend that since the passage of BMA-66 of the plaintiff must amend its complaint to conform to the standards of BMA-66.

The plaintiff takes the position that the Sherman and Clayton Acts are still the only statutes applicable to this suit and that BMA-66 only has an effect upon the Comptroller. The stated purpose of BMA-66 reads:

> "An act to establish a procedure for the review of proposed bank mergers so as to eliminate the

necessity for the dissolution of merged banks, and for other purposes."

The stated purpose of BMA-66, the text of the act itself, and the legislative history of the act (see U. S. Code and Congressional & Administrative News, pamphlet No. 2, beginning at page 334), all clearly show that the standards set forth in Section 18(c)(5) of the Federal Deposit Insurance Act (12 USCA 1828(c)(5), as amended by BMA-66, are the standards to be applied by the courts.

Since this court can take judicial notice of a Federal statute, we will not dismiss the complaint merely because it cites the wrong statute.

Under modern notice pleading all that the complaint is required to do is to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Conley* v. *Gibson*, 355 U. S. 41, 47. A complaint should not be dismissed for insufficiency unless it appears to a certainty that the plaintiff can prove no sets of facts in support of his claim which would entitle him to relief. Id., page 45, and see also Moore's Federal Practice, Vol. 2, § 12.08, p. 2245. In other words, a motion to dismiss will not be granted if the complaint states a claim for which relief can be granted under any legal theory. In determining the sufficiency of a complaint, material facts, but not unsupported conclusions of the pleader, are considered in the light most favorable to the plaintiff.

If everything in the plaintiff's complaint is taken as true and looked upon in the light most favorable

to the plaintiff, can it be said that the plaintiff has sufficiently alleged a violation of BMA-66, thereby giving the defendants fair notice of what the plaintiff's claim is and the grounds upon which it rests? To answer this question we must determine what the nature of an action under BMA-66 is, that is, what grounds constitute a violation thereof.

The language of BMA-66 is clear and unambiguous. In plain language, paragraph 18(c)(5)(B) states, in part, that a proposed merger shall not be approved whose effect is in restraint of trade unless it finds that the anticompetitive effects are outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community to be served. Section 2(c) specifically requires this court to apply the standards of 18(c)(5) as amended by BMA-66.

This court will not dismiss a complaint merely because it states the wrong legal theory when the allegations are sustainable under another legal theory, nor will this court require the plaintiff to plead in detail the facts constituting its grounds for relief. However, the most liberal interpretation of the rules of pleading require as an absolute minimum that the plaintiff at least state his grounds for relief and have not gone so far as to permit a pleading to stand which does not even allege a violation of any applicable law or duty.

The complaint does not allege a monopoly, but alleges that the merger may substantially lessen competition and tend to create a monopoly in violation of Section 7 of the Clayton Act. Thus, the com-

plaint only states part of a claim against the defendants required under BMA-66, in that it does not allege a monopoly, nor that the anticompetitive effects of the merger are not outweighed in the public interest by the probable effects of the transaction in meeting the convenience and needs of the community. The plaintiff's complaint does not meet the absolute basic minimum standards of notice pleading, in that it has not alleged a violation of BMA-66, the act that applies to all bank mergers, nor has it alleged sufficient facts to support such violation.

The separate motion of defendant Banks and the separate motion of intervening defendant to dismiss are each sustained. Plaintiff is granted twenty (20) days within which to file an amended complaint, and failing to file said amended complaint this cause will be dismissed.

U. S. District Judge

II

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 65C 241 (1)

UNITED STATES OF AMERICA, PLAINTIFF

vs.

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION and SECURITY TRUST COMPANY, DEFENDANTS

and

COMPTROLLER OF THE CURRENCY, JAMES J. SAXON, INTERVENING DEFENDANT

ORDER OF DISMISSAL

It is ORDERED that this cause be and the same is hereby dismissed for failure to comply with order of December 19, 1966.

/s/ ROY W. HARPER
U. S. District Judge

Dated this _____ day
of January, 1967.

APPENDIX B

I

May 27, 1965

Honorable James J. Saxon
Comptroller of the Currency
Treasury Department
Washington, D.C. 20220

Dear Mr. Saxon:

This is in response to a letter from your office dated May 3, 1965, requesting a report, pursuant to the provisions of Section 18(c) of the Federal Deposit Insurance Act, on the competitive factors involved in the proposed merger of Security Trust Company, St. Louis, Missouri (hereinafter Security Trust), into Mercantile Trust Company National Association, St. Louis, Missouri (hereinafter Mercantile Trust).

The proposed merger would unite, and thus eliminate all competition between, two banks whose only offices are located on opposite sides of the same street in downtown St. Louis. This in itself would appear sufficient to require serious inquiry into the competitive implications of the proposal. When superimposed upon the facts that the acquiring bank is the largest, not only in the City of St. Louis, but in the entire State of Missouri; that it already has control of about 31% of the deposits of the city's 25 commercial banks[1] and would increase its share

[1] For purposes of this analysis, Mercantile-Commerce National Bank is considered a part of Mercantile Trust, for the reasons stated hereafter.

to almost 35% by the merger; and that the merging bank ranks fifth in size in the City of St. Louis and sixth among the 131 banks in the largest service area contended for, it is apparent that unless the proposal is dictated by the most grievious financial necessity it cannot escape condemnation under the principles enunciated by the Supreme Court in *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963) and *United States* v. *First National Bank and Trust Company of Lexington*, 376 U. S. 665 (1964). The application presents no support for any such theory of necessity.

Security Trust, which was organized in 1922, had total assets of $123,938,000, deposits of $110,425,000, net loans and discounts of $59,816,000, and total capital accounts of $11,480,000 as of February 28, 1965. It acquired $14,653,000 in deposits and $7,156,000 in loans by virtue of a 1960 merger with Plaza Bank of St. Louis. It performs all the usual functions of a commercial bank including the offering of trust services.

Mercantile Trust was organized in 1855 and recently became a national bank. It has had no merger since 1951, when it merged the Mississippi Valley Trust Co., with assets of $250.5 million. As of February 22, 1965, Mercantile Trust had total assets of $876,766,000, deposits of $787,448,000, net loans and discounts of $456,657,000, and total capital accounts of $106,722,000. It is the largest commercial bank in the State of Missouri and is 42nd in size among all banks in the United States. It is also one of the leading corporate trustees in the nation.

A somewhat unusual relationship exists between Mercantile Trust and the Mercantile-Commerce National Bank. The latter was organized in 1930 as a wholly-owned subsidiary of Mercantile Trust and the stock of that bank is presently held in a voting trust for the benefit of Mercantile Trust stockholders. Five of Mercantile Trust's directors sit on the Board of Mercantile-Commerce and one of them is President of Mercantile-Commerce. For purposes of any competitive analysis, these two banks must be and are considered as one. While the application does not provide information for Mercantile-Commerce as of the same recent date as is provided for Mercantile Trust, consideration of the affiliation of these two banks would increase the deposits presently controlled by Mercantile Trust to something in excess of $776.3 million and the loans to about $475.6 million. The assets of Mercantile-Commerce alone are larger than those of 14 of the banks in the City of St. Louis.

The applicants, relying primarily on the Bureau of the Budget's "Standard Metropolitan Statistical Area," contend that the area within which the competitive effect of the proposed merger should be measured includes not only the entire City of St. Louis, but also St. Louis County, Jefferson County, Franklin County, and St. Charles County, Missouri, as well as Madison County and St. Clair County, Illinois, located across the Mississippi River from St. Louis.

In delineating the area affected by a merger, we start with the premise that "the proper question to be asked . . . is not where the parties to the merger

do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States* v. *Philadelphia National Bank*, *supra*, at 357. In view of the proximity of the merging banks, we feel that the choice of any area larger than the City of St. Louis as a background against which to measure the effects of this merger serves but to cloud rather than clarify the competitive impact of the proposal. In fact, in view of the provisions of Missouri law which prohibit branch banking, the area might be more finely drawn. The applicants, for example, concede that "basically, the selling bank emphasizes services to individuals in the *downtown* St. Louis area. . . ." (Application, Exhibit II D. 1. Emphasis added.) And, certainly, if the area contended by the applicants is a relevant market area, that portion of downtown St. Louis which includes the four largest and five of the six largest of the 131 banks in the greater market area is the center of the area and a relevant sub-market. For purposes of this analysis, however, we think the City of St. Louis is an area which is neither so large as to hide the true competitive impact of the transaction nor so small as to overlook significant competitive alternatives available to the average customer. This is not to deny that there is a degree of competition with, for example, the National Stock Yards Bank, which is located just across the Mississippi River in Illinois. That area of competition, primarily for the business of larger customers and correspondent ac-

counts, is however, not the area most immediately and directly affected by the merger.

The effect of the proposed merger on competition within the City of St. Louis is illustrated by the following table, indicating the deposits and loans held by St. Louis banks as of December 31, 1964:

(000 omitted)

	Deposits	%	Loans	%
Mercantile Trust[1]	$ 879,602	30.8	$ 510,862	32.6
Security Trust	116,835	4.1	62,126	4.0
Resulting Bank	996,437	34.9	572,988	36.6
First National	705,068	24.7	367,757	23.5
Boatmen's Nat. Bank	245,777	8.6	120,203	7.7
Bank of St. Louis[2]	147,710	5.2	99,788	6.4
Tower Grove B & T	101,216	3.5	56,211	3.6
Manufacturers B & T	65,192	2.3	33,013	2.1
Manchester Bank	64,361	2.3	33,420	2.1
Jefferson B & T	59,854	2.1	25,326	1.6
Southwest Bank	47,625	1.7	24,945	1.6
Lindell Trust	45,041	1.5	25,655	1.6
South Side Nat. Bank	40,018	1.4	24,084	1.5
Jefferson-Gravois Bank[2]	38,463	1.3	21,762	1.4
American Nat. Bank	37,682	1.3	20,302	1.3
Cass Bank & Trust	33,723	1.2	15,625	1.0
Hampton Bank	31,153	1.2	19,298	1.2
Mound City Trust	31,099	1.1	20,102	1.3
Northwestern Bank & Trust[2]	29,316	1.0	16,216	1.0
Baden Bank[2]	28,298	1.0	15,459	1.0
Southern Commercial & Savings	21,774	0.8	14,361	0.9
Chippewa Trust	20,562	0.7	11,415	0.7
North St. Louis Trust	19,314	0.7	6,712	0.4
Bremen Bank & Trust	18,212	0.6	7,043	0.4
Easton-Taylor Trust	16,781	0.6	8,820	0.6
City Bank	9,781	0.3	5,942	0.4
Total	$2,854,457	100.0%	$1,566,448	100.0%

[1] Includes $42,093,000 in deposits and $20,697,000 in loans of Mercantile-Commerce National Bank.

[2] A subsidiary of General Bancshares, Inc.

As is indicated by the above table, commercial banking in St. Louis is already highly concentrated, with the two leading banks accounting for 55.5% of the total deposits and 56.1% of the loans held by the area's 25 banks. The proposed merger would increase these shares to 59.6% and 60.1% respectively. The three largest banks plus the General Bancshares group control 72.7% of the deposits and 73.6% of the loans. The merger would increase this concentration to 76.8% and 77.6% respectively.

This concentration must be viewed against the holding of the Supreme Court that:

> (A) merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. . . . Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat. (*United States* v. *Philadelphia National Bank*, *supra*, at 363-64.)

Against that background, the legal infirmity of the proposed merger under Section 7 of the Clayton Act becomes apparent.

Nor is the proposal on any safer ground when tested against the more stringent standards of the Sherman Act, which requires proof of an actual restraint of trade rather than a probability of a sub-

stantial lessening of competition. The Supreme Court has held that "where merging companies are major competitive factors in a relevant market, the elimination of significant competiton between them, by merger or consolidation, itself constitutes a violation of the Sherman Act." *United States* v. *First National Bank and Trust Co. of Lexington*, 376 U. S. 665, 671-72 (1964). Can it be said that the merging banks, the largest and fifth largest of the twenty-five banks in the relevant market, are not "major competitive factors" in that market? Or can it be seriously contended that the merger of these two large commercial banks located on opposite sides of the same street will not result in "the elimination of significant competition between them"? To state the question is, we think, to answer it. Although the applicants state at one portion of the application that "there is only a minimum of competition between the participating banks" because "the selling bank emphasizes services to individuals in the downtown St. Louis area, while the purchasing bank has concentrated on correspondent banking, national accounts, large trust accounts and other 'wholesale' banking services," this clearly understates the competition between them. Over 88% of the I.P.C. deposits of Mercantile Trust originate within the State of Missouri and obviously a large portion of that amount originates from St. Louis and is the subject of competition between the two adjacent banks. Although Mercantile Trust may emphasize national accounts to a greater degree than Security Trust, we doubt that they seriously would contend that they have

spurned the individuals and businesses in the downtown St. Louis area which Security Trust endeavors to serve. Mercantile Trust not only competes to serve those individuals and businesses, but has been successful in doing so in a great number of instances, thus permitting its advertising claim: "Serving more St. Louisians than any other bank."

In the greater St. Louis area alleged by the applicants to be the relevant market, the concentration picture is not essentially different from that presented with the City of St. Louis. In the larger area, Mercantile Trust accounts for 18.7% of the total deposits held by 131 banks. The resulting bank, with 21.5% of the area deposits, would exceed its closest competitor by over $290 million in deposits and would be over three times as large as the third largest bank in the area. The three largest banks plus the General Bancshares affiliates would control over 49% of the area deposits.

Although the applicants allege a loss of depositors as a result of the restrictions on branching which prevent their following the population movement to the suburbs, both banks have shown an impressive and constant growth in their deposits. In the last ten years, the deposits of Mercantile Trust have increased by about $260 million, an amount greater than the total deposits of any but its largest competitor. The rate of increase during that period was about 43.9%, as compared to a toal increase for all city banks of 27.0%. In 1960 it surpassed First National, theretofore the largest bank in St. Louis,

for the first time and its growth since that time has continued to outstrip that of its largest rival. Deposits of Security Trust increased by $6.8 million during the last year alone, an increase of 5.7% over the previous year. During the last five years, its deposits have increased by 21.2% discounting the increase directly attributable to acquisition. It is thus clear that the merger cannot be justified on any theory of inability of either bank to grow internally.

In view of the fact that our analysis at this time indicates that the effect of the proposed merger "may be substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7 of the Clayton Act and would result in the elimination of significant competition between major factors in a relevant market in violation of Section 1 of the Sherman Act, we would greatly appreciate the opportunity, should you be inclined to approve the application under the provisions of the Bank Merger Act, to discuss with you the antitrust enforcement problems raised by the proposal.

A summary of this report is attached.

Sincerely yours,

WILLIAM H. ORRICK, JR.
Assistant Attorney General
Antitrust Division

Attachment

Summary of the Report of the Department of Justice on the Competitive Factors Involved in the Proposed Merger of Security Trust Company, St. Louis, Missouri, into Mercantile Trust Company National Association, St. Louis, Missouri

The proposed merger would increase the deposits of Mercantile Trust, already the largest commercial bank in Missouri and 42nd largest in the nation, by over 13%. In addition it would eliminate a highly competitive bank in Security Trust, whose office is located across the street from Mercantile Trust's office in downtown St. Louis.

The resulting bank, with deposits of $996.4 million, would hold 34.9% of the deposits held by 24 banks in the City of St. Louis and 21.5% of the deposits held by the 130 banks in the greater St. Louis area. Its deposits would exceed those of its closest competitor by over $290 million and would be over three times as large as the third largest competitor.

It is our opinion that the anticompetitive effects of the proposed merger are substantial and seriously adverse.

II

June 9, 1965

REPORT BY THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
to the
Comptroller of the Currency, under section 18(c) of the Federal Deposit Insurance Act, on the competitive factors involved in the proposed merger of
SECURITY TRUST COMPANY, ST. LOUIS, MISSOURI
into
MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION, ST. LOUIS, MISSOURI

I. THE PROPOSAL

Mercantile Trust Company National Association, St. Louis, Missouri (deposits $737,448,000 as of February 28, 1965) (Mercantile), has requested prior written consent of the Comptroller of the Currency to merge with Security Trust Company, St. Louis, Missouri (deposits $110,425,000 as of February 28, 1965) (Security), under the charter and title of Mercantile. At the present time, each of the participants operates one drive-in facility (branch). Incident to the merger, the drive-in facility of Security would be operated by the resulting bank. It is also proposed that the main office of Security, located across the street from the main office of Mercantile, will either be connected in some manner, or be used for functions which will not constitute a violation of the prohibition against branch banking under State law.

II. The Communities and Banking Areas Involved

St. Louis, Missouri, population 725,000 (March 1964 estimate), is a major center for rail, highway, air, and waterway transportation, and an important manufacturing and distribution point. Some of the important local industries are marketing and processing of agricultural products, brewing, chemicals, production and refining of primary metals, metal products, transportation equipment, and electrical machinery. The St. Louis metropolitan area includes the city and county of St. Louis and the counties of Jefferson, Franklin, and St. Charles in Missouri, and St. Clair and Madison in Illinois. The combined population of this area was estimated at 1,527,000 in March of 1964. Although this section has developed slowly in recent years compared with other areas in the United States in terms of population, employment, and manufacturing output, the future growth prospects are, nevertheless, excellent.

III. Competition Between the Two Institutions

Security has emphasized services to individuals in the downtown St. Louis area, and Mercantile has concentrated on correspondent banking, national accounts, large trust accounts, and other wholesale banking services.

The two participants are located across the street from each other and, from the standpoint of convenience, are in direct competition with each other. For the very large customers to which Mercantile

caters, Security is not a true alternative due to its smaller size. In the past, Security has more aggressively sought the small individual account. The higher service charges and the lack of direct consumer credit for individuals by Mercantile has, to some extent, lessened competition between the banks. However, in the area of medium size business accounts the two banks have been fairly aggressive competitors. As noted below, Mercantile has 43 per cent of its loan portfolio in commercial and industrial loans, and Security has 37 per cent of its portfolio in such credits.

A comparison of deposit structures of the two banks shows that total demand deposits equaled about 62 per cent of total deposits, while total time and savings deposits comprise about 38 per cent of total deposits at Mercantile; at Security, demand deposits totaled 58 per cent and time and savings deposits 42 per cent of total deposits. As of February 28, 1965, approximately 18 per cent of Mercantile's total deposits were deposits of banks, compared with 7 per cent for Security. Although both banks extend the same types of credits, there are some differences in relative amounts. At Mercantile, commercial and industrial loans were 43 per cent, real estate loans comprised 10 per cent, loans to financial institutions equaled 10 per cent, and loans to individuals (both instalment and single payment) totaled 31 per cent of total loans. A large portion of Mercantile's instalment paper is represented by indirect loans obtained through dealers. At Security, commercial and industrial loans were 37 per cent, real estate loans

totaled 18 per cent, loans to financial institutions equaled 18 per cent, and loans to individuals (both instalment and single payment) comprised about 27 per cent of total loans.

The application discloses that approximately 22 per cent of deposits and 27 per cent of loans of Mercantile are derived from outside the metropolitan St. Louis area, compared with approximately 7 per cent of deposits and 10 per cent of loans of Security.

An analysis of accounts over $10,000 disclosed that of 842 such checking accounts and 925 such time and savings accounts at Security, 39 checking accounts and 33 time and savings accounts are known to be from customers of Mercantile; of 751 loans over $10,000, 41 are to customers of Mercantile. It is indicated that approximately 90 per cent of the 39 common demand accounts are those of correspondent banks.

All of the banks in the downtown area of St. Louis pay 3 per cent interest on savings computed daily, up to 4¼ per cent on time certificates of deposit to individuals with corporate rates subject to negotiation, and charge $4 per hundred add-on interest on instalment loans, 5½ to 5¾ per cent on real estate loans, and 4½ per cent and up on business loans. There are wide differences in the calculations of service charges of these banks, with Security apparently maintaining the lowest charges on individual accounts, and Mercantile the highest. The schedules for corporate accounts are said to show fewer differences due to the competitive pressures of obtaining and retaining such accounts.

The application emphasizes the need for greater credit capabilities of banking institutions in St. Louis. It cites the relationships of local major firms with banks outside the community and, in particular, four firms which borrow to the full loaning limit of Mercantile, and which have gone to other financial centers for their excess requirements. According to the application, the transaction involves the payout of the capital funds of Security and, therefore, there would be no increase in capital funds or in the legal lending limit for the resulting bank. As of February 28, 1965, total loans, including $9 million in Federal funds, were equal to about 63 per cent of deposits at Mercantile and 54 per cent of deposits at Security. The ability of the resulting bank to expand materially its loanable funds would, therefore, appear limited. In the absence of increased lending limits and a significant increase in loanable funds, the competitive position of the resulting bank with respect to major accounts would not appear to be enhanced.

Neither of the merging banks has participated in loans with the other. During 1964, Mercantile originated 116 loans aggregating $87.5 million, of which $45.6 million was sold to others and $41.9 million was retained; however, only 3 loans totaling $435,000 were reported to have been shared with other banks because of loan limits. Security originated 49 loans aggregating $11.2 million, of which $3.7 million was participated and $7.5 million was retained. Four loans aggregating $5.6 million were reported to have been shared with other banks because of loan limitations, Security retaining $4.2 million and participat-

ing $1.4 million. The majority of participation loans made by both Mercantile and Security were with correspondent banks to provide them with earnings assets.

Mercantile is said to have the second largest Trust Department, the largest Foreign Department, and the largest U. S. Government and Municipal Bond Department of any bank in St. Louis. In contrast, Security has a medium size trust department and no bond or foreign banking department.

The proposed merger would eliminate existing and potential competition between the two banks.

IV. Effect on Other Institutions

In analyzing the effects of the proposed merger on competition, the application indicates that the area served by the banks is the St. Louis Standard Metropolitan Statistical Area, which is comprised of the city of St. Louis; the counties of St. Louis, St. Charles, Jefferson, and Franklin in Missouri; and the counties of Madison and St. Clair in Illinois. An investigation of the proposal revealed that the applicable competitive area was somewhat less, with all of Jefferson and Franklin Counties and part of St. Charles County in Missouri and part of Madison and St. Clair Counties in Illinois being excluded. Due to the limited banking resources in the area excluded, there would appear to be little change in the overall relationships as presented in the application. The area excluded is primarily agricultural, and the banking needs of the people in this section are met to a great extent by small local banks.

The following schedule shows those banks in the applicable area served by applicants (dollar amounts in thousands as of December 31, 1964).

	Distance from Merging Banks	Total Deposits Amount	Total Deposits Per cent	Loans Amount	Loans Per cent
Mercantile T/C NA	-	$ 887,509	19.8	$ 482,029	21.0
Mercantile-Commerce T/C[1]	2.3 miles	42,093	1.0	20,438	.9
Security Trust Company	-	116,826	2.8	62,126	2.7
Resulting Bank		$ 996,428	23.6	$ 564,593	24.6
First Nat'l Bk., St. Louis	2 blocks	$ 705,063	16.7	$ 430,014	18.7
Boatmen's N/B, St. Louis	4 blocks	245,777	5.8	130,010	5.7
Bank of St. Louis	3 blocks	147,710	3.5	99,788	4.3
St. Louis Co. N/B, Clayton	3.3 miles	137,394	3.2	59,302	2.6
Nat'l Stock Yards N/B, Illinois	4.2 miles	126,748	3.0	52,150	2.3
Tower Grove Bank & T/C	3.3 miles	101,216	2.4	57,211	2.5
Other Banks:					
19-St. Louis	-	658,096	15.6	350,068	15.2
36-St. Louis County	-	633,867	15.0	336,762	14.6
13-Madison County, Ill. (part)	-	233,868	5.5	103,609	4.5
11-St. Clair County, Ill. (part)	-	203,463	4.8	99,879	4.3
3-St. Charles, Mo.	-	35,988	.9	16,681	.7
Totals		$4,225,568	100.0	$2,300,012	100.0

[1] This bank is included by virtue of the fact that all of the capital stock of Mercantile-Commerce Company, which owns control of Mercantile-Commerce Trust Company, is held in trust for the benefit of shareholders of Mercantile, and Mercantile has the power to appoint successor trustees for the trust.

Security until recently owned about 28 per cent of The First National Bank of Clayton, Clayton, Missouri (deposits $33 million). In a letter dated May 28, 1965, addressed to the president of Mercantile by the president of Security (a copy of which was forwarded to the Federal Reserve Bank of St. Louis), it was stated that Security had reduced its stock holdings of the Clayton bank to 14,599 shares. In addition, the letter indicated that Security held options to purchase an additional 400 shares of the Clayton bank stock. Thus, it appears that Security now owns or has under option 14,999 shares, or 24.9 per cent of the Clayton bank's outstanding stock.

The proposed merger would eliminate one alternative for individuals who work in the downtown area, and there would be only four banks remaining in this section of the city. Numerous alternatives remain outside of the downtown section, although the nearest would be about 2 miles distant.

It was reported that several of the bankers interviewed during the investigation made in connection with the application expressed concern over the creation of a "billion dollar bank," which would far exceed the size of any of the other local institutions. These bankers indicated that the only probable solution, if the merger is approved, would be another merger to create a second "billion dollar bank." They stated that the creation of a bank with deposits which would exceed the total deposits of the two next largest banks in the area combined would place Mercantile at such a competitive advantage in the field of major accounts that it would likely result in an attempted merger be-

tween two other downtown banks, the consummation of which would reduce further the available banking alternatives.

In recent years there has been a marked change in the share of the market for deposits and loans of major area banks. In 1950, the two banks which merged to form Mercantile held about 25 per cent of area deposits, compared with somewhat less than 20 per cent for Mercantile in 1964. First National Bank, St. Louis, the second largest bank in the area, was involved in a merger during this period, but its share of deposit market decreased from about 20 per cent in 1950 to about 17 per cent in 1964. The only major bank to show an increase in its share of the deposit market is St. Louis County National Bank, located in Clayton, a suburb of St. Louis. The remaining banks in St. Louis County increased their share of the deposit market from 6.6 per cent in 1950 to 15 per cent in 1964. Despite this, the large area banks all have experienced satisfactory growth. From 1950 to 1964, the number of banks in St. Louis decreased from 28 to 26, while the number of banks in St. Louis County increased from 27 to 37.

In addition to commercial banks, almost all leading insurance companies, most of which provide long-term loans for residential, commercial, and industrial requirements serve the St. Louis community. Also personal loan and sales finance companies, savings and loan associations, credit unions, factoring firms, and direct lending agencies of the Federal Government provide additional competition.

V. Conclusion With Respect to Competitive Factors

The proposed merger of Security Trust Company, St. Louis, into Mercantile Trust Company National Association, St. Louis, would eliminate existing and potential competition between the two banks, particularly in the area of loans to medium and small-sized businesses. The proposal would reduce the number of banks in downtown St. Louis from five to four, and would strengthen further the dominant position of Mercantile Trust Company, largest bank in the area. The effect of the proposal on competition would be significantly adverse.

Note

As required by section 18(c) of the Federal Deposit Insurance Act, this report is limited to "a report on the competitive factors involved," and is not a recommendation as to whether the application should be approved or disapproved.

III

June 10, 1965

The Board of Directors
Federal Deposit Insurance Corporation

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION
ST. LOUIS, MISSOURI

SUBJECT: Request by the Comptroller of the Currency for Report on the Competitive Factors Involved in a Proposed Merger

Pursuant to the provisions of Section 18(c) of the Federal Deposit Insurance Act, the Comptroller of the Currency on May 3, 1965, requested from the Corporation a report on the competitive factors involved in the proposed merger of SECURITY TRUST COMPANY, ST. LOUIS, MISSOURI (Security), total resources $123,938,000, and the captioned bank (Mercantile), total resources $876,766,000, under the latter's charter and title. It is proposed that the main office of Security will be discontinued and its drive-up facility will be operated as a facility of Mercantile. Branch banking is prohibited by state law but the operation of a limited power facility is permitted.

CONCLUSION OF THE BOARD OF DIRECTORS:

The Board of Directors has concluded that this memorandum should constitute the Corporation's report to the Comptroller of the Currency and that a copy of same be transmitted to him with a statement to the effect that consideration has been given to the elements of competition involved and, without re-

gard to the banking factors which may be of paramount importance in this proposal, the Board of Directors has concluded there will be some diminution of competition in downtown St. Louis but that there would be no significant effect on competition either in downtown St. Louis or in the regional service area of Mercantile.

SUMMARY AND CONCLUSION

Mercantile, the largest bank in St. Louis and its six-county service area, an $876.8 million institution, would acquire by merger, Security, a $123.9 million bank which is the fifth largest bank in downtown St. Louis.

Security's service area is confined to the city of St. Louis and is contained in the regional service area of Mercantile. The merging banks are located across the street from each other and competition between them in the downtown area of St. Louis is considered keen. State law prohibits branch banking and thus the proposal will eliminate an alternative banking source.

The proportion of deposits to be controlled by the resulting bank among the 132 banks in the regional service area is not disproportionate at 21.4%. The relatively small gain in deposits and loans would not significantly affect overall competition in the 6-county area. A measure of relative size within Security's service area indicates the resulting bank would control 33.2% of the aggregate total deposits owned by the 26 St. Louis banks. Mercantile would become larger with respect to deposits and loans but with

no greater lending limit since its capital structure will be reduced. The proposal would not enhance Mercantile's ability to compete on a national scale but could enhance its competitive position in St. Louis through its ability to make more loans.

It is concluded there will be some diminution of competition in downtown St. Louis but that there will be no significant unfavorable effect on competition either in downtown St. Louis or in the regional service area of Mercantile.

Analysis of the Competitive Factor

The application indicates the basic reason for the proposed transaction with respect to Security is the latter's management succession problem. Reasons advanced for Mercantile's desire to effect the proposal include a lack of sufficient deposits in relation to capital which has hampered the lending capacity of Mercantile; the stringent prohibition against branch banking coupled with a population movement to outlying areas that has resulted in loss of customers which the bank was unable to "follow"; and the need in St. Louis for a bank with greater capacity to meet the area's credit needs, keep pace with and support St. Louis industry, and contribute as much as possible to financing the development of the area's natural resources. It hoped the proposal will bring sufficient new deposits to allow Mercantile to grow and provide more financial assistance to the entire Mississippi Valley and Mid-South area. Reportedly, a very significant amount of St. Louis area companies conduct a large share of their banking business in other cities

because of the limited lending capacity factor. It is contended that the loss of retail customers lends further proof that the merging banks must depend upon an increased ability to serve commerce and industry if they are to provide substantial financial service to the area. According to the application, St. Louis based companies are unable to arrange even a respectable percentage of their financing requirements locally. The tremendous growth in the automobile production and iron mining activities taking place in the St. Louis area have been financed largely by non-local resources and it is hoped that if the proposal is approved the St. Louis community will be provided with an improved financial implement whereby local businessmen and citizens will be better able to participate in the rebirth of the city.

Review examiner observes that, under the merger agreement, cash will be paid for the capital stock of Security and there will be a decrease in the aggregate capital of the combined banks. The total capital account of the resulting bank, according to the pro forma statement, will be $10.0 million less than that of Mercantile and, therefore, a decrease in the lending limit will result. The applicant feels, however, that future earnings retention or other additions to the appropriate capital accounts will eventually increase the lending limit. Any such periodic increases by earnings retention would most likely be relatively limited in amount and a competitively effective increase could be accomplished only over a period of time during which competing banks would also be increasing their capital accounts. The resulting bank

may be able to immediately grant more loans but not larger loans.

Mercantile was organized in 1855 as the State Savings Institution. The present bank is a result of a series of mergers, the last of which was effected in 1951. It converted to a National Association on December 24, 1964 apparently because the Federal Reserve System would not countenance continued membership and operation of Mercantile Mortgage Company, Clayton and St. Louis, Missouri. This firm was activated in June, 1963 as a loan and loan servicing business and reportedly operates a number of offices, including some in other states. The Federal Reserve System reportedly viewed this as a violation of the state law prohibiting branch banking. The 10,000 shares of the mortgage company were carried in Mercantile's investment account at $1,075,000 at the last examination, May 15, 1964. Mercantile has another subsidiary, Mercantile-Commerce Trust Company, which is located in St. Louis. At the May 15, 1964 examination Mercantile's trust department held personal assets carried at $1,548,074,800.

Security began business in 1922 as the Security National Bank Savings and Trust Company and in 1958 merged with the Mutual Bank and Trust Company. In 1960 a merger was effected with The Plaza Bank of St. Louis by which Security acquired $7.2 million in loans and $14.7 million in deposits. A limited bank facility was established at about this time and is located across the street from the former Plaza bank. In 1962 Security withdrew from the Federal Reserve System to become an insured state nonmem-

ber bank. At the last examination, July 13, 1964, Security owned 28.5% of the outstanding stock of The First National Bank of Clayton, Clayton, Missouri. The investigating examiner states that the comparable investment is still likely held and, if so, consummation of the proposed merger would appear to bring the resulting bank within the provisions of the Bank Holding Company Act of 1956. At the last examination Security's trust department held personal assets totaling $44,704,700.

The participating banks are located in downtown St. Louis across the street from each other. According to the application, Security serves the city of St. Louis and emphasizes services to individuals in the downtown area while Mercantile, reportedly, has concentrated on correspondent banking, national accounts, large trust accounts and other "wholesale" banking services. The application does not specifically define the service area of either bank, that is, the area from which each derives 75% or more of its IPC deposits. The investigating examiner states that the two participating banks would certainly compete keenly in the downtown area and possibly farther, but the competitive effect of Security would most likely diminish rapidly with each mile from the central city. The application schedules all banks within the St. Louis metropolitan area which includes the city of St. Louis and six surrounding counties, two of which are located in Illinois, and apparently considers this to be the regional service area. This area is used, according to the application, by the United States Depart-

ment of Commerce, the Labor Department and the Bureau of Budget in the compilation of business, manufacturing, retailing, labor force and other economic and financial data and the Corporation and the Federal Reserve Board also use it for banking purposes. The population of St. Louis is 750,026 and and that of the metropolitan area is estimated at 2,180,000.

St. Louis is located at the center of a trade area 200 to 300 miles wide and deep extending from the northern to the southern boundaries of Missouri, and from the eastern boundary of Illinois most of the distance west to Kansas City, Missouri. St. Louis is situated on the west bank of the Mississippi River and is the second largest rail center in the nation. Manufacturing is well diversified and the industrial area is the only one in the nation producing all six basic metals; iron, lead, zinc, copper, aluminum and magnesium. St. Louis is one of the principal grain markets in the United States and is the second largest hog market in the world. The metropolitan area ranked third in the nation in 1964 model automobile production. It is estimated that $2.0 billion of major building projects are under construction or in the planning stage. Hundreds of national firms operate offices in downtown St. Louis, 274 firms employ more than 300 people each and 67 firms employ more than 1,000 persons in the metropolitan area. Twenty two foreign countries maintain Consulates in St. Louis and it is estimated that annual foreign business exceeds $500,000,000.

The following schedule includes all banks in St. Louis and the six neighboring counties comprising

Mercantile's regional service area. Subtotals (a) and totals (b) reflect the concentration within St. Louis (Security's service area) and the regional service area, respectively. Figures are expressed in thousands as of June 30, 1964:

Name of Bank	Total Deposits Amount	%(a)	%(b)	Loans Amount	%(a)	%(b)
Mercantile	712,082	27.4	17.7	442,564	29.5	20.0
Security	111,363	4.3	2.7	60,784	4.1	2.8
Resulting Bank	823,445	31.7	20.4	503,348	33.6	22.8
City of St. Louis						
Mercantile-Commerce Trust Company (1)	38,851	1.5	1.0	18,007	1.2	.8
Subtotals	862,296	33.2	21.4	521,355	34.8	23.6
First National Bank in St. Louis	628,599	24.2	15.6	376,222	25.2	17.0
The Boatmen's National Bank of St. Louis	233,275	9.0	5.8	111,163	7.4	5.0
Bank of St. Louis (2)	140,892	5.4	3.5	96,104	6.4	4.3
**Tower Grove Bank and Trust Company	99,565	3.8	2.5	54,250	3.6	2.4
19 other banks (ranging in deposit size from $9 million to $67 million)	632,905	24.4	15.7	337,746	22.6	15.3
*26 Subtotals (a)	2,597,532	100.0		1,496,840	100.0	
37 St. Louis County banks (ranging in deposit size from $.8 million to $104 million)	691,996		17.2	396,949		16.8
10 Jefferson County banks (ranging in deposit size from $2 million to $9 million)	40,459		1.0	21,035		1.0
10 Franklin County banks (ranging in deposit size from $1 million to $10 million)	50,303		1.3	27,943		1.3
6 Charles County banks (ranging in deposit size from $2 million to $14 million)	41,874		1.1	19,306		.9
21 Madison County Banks (Illinois) (ranging in deposit size from $1 million to $39 million)	254,709		6.3	112,127		5.1
22 St. Clair County banks (Illinois) (ranging in deposit size from $2 million to $113 million)	347,048		8.6	160,841		7.3
*132 Totals (b)	4,023,921		100.0	2,208,041		100.0

(1) Affiliate of Mercantile

(2) Affiliate of General Bancshares Corporation, a holding company; which owns five other banks; three in St. Louis and two in St. Louis County. Aggregate deposits and loans of the six affiliated banks are $245,383 and $157,686, respectively, or 6.1% and 7.1%, respectively, of the totals represented in the six-county area. The four affiliated banks in St. Louis hold 9.0% and 10.0% of the aggregate deposits and loans, respectively, owned by the 26 St. Louis banks. (Deposits and loans are expressed in thousands of dollars.)

*—Represents number of banks.

Note: Figures are presented in the application which purportedly represent deposits after deduction of amounts derived from sources outside the St. Louis metropolitan area for the participating banks, the three largest competing banks in St. Louis and the National Stock Yards bank (St. Clair County). Such deposits for the participating banks are claimed to be actual figures and deposits for the other four banks are stated to be reduced proportionately. Total deposits (a) would be reduced by $416,351,000, (b) would be reduced by $443,294,000 and the foregoing statistics would not differ significantly if such deposits were used; the resulting bank would control 31.4% of (a) and 19.1% of (b).

The proportions of deposits and loans controlled by the resulting bank, when measured within the regional service area of Mercantile, would not be significantly disproportionate. The resulting bank would control 21.4% and 28.6% of the aggregate of such bank resources, respectively. Among 25 St. Louis banks the resulting bank would control 33.2% of the aggregate total deposits and 34.8% of the aggregate loans. The second largest bank holds 24.2% and 25.2% of such deposits and loans, respectively, and together both banks would control about 57% and 60% of the aggregate deposits and loans, respectively. A wide disparity in deposit size is evident between each of the two largest banks and the remaining 24 banks, the largest of which owns 9.0% of the aggregate deposits owned by all banks in St. Louis.

As of November 18, 1964, the following relationship existed among the deposits held by the merging banks.

	Mercantile		Security	
	No. of Accts.	Amount	No. of Accts.	Amount
$10,000 or less	94.9%	14.3%	96.6%	39.0%
$10,000 to $25,000	2.8	7.2	2.1	13.6
$25,000 to $100,000	1.5	13.4	1.0	19.2
$100,000 or more	.8	65.1	.3	28.2
	100.0%	100.0%	100.0%	100.0%

To the extent that size of deposit may help to identify and distinguish among relevant areas of competition, and using accounts of $100,000 or more as a delineator, the above figures suggest that approximately one-third of Mercantile's deposits might come from a

"local" market while almost three-fourths of Security's deposits are found in this area.

A further viewpoint in determining the possible competitive effects of the merger would be to measure concentration in the regional service area of Mercantile in terms of size of deposit account. The following figures are as of November 18, 1964.

TOTAL DEPOSITS

	Number of Accounts			Amount of Deposits		
	Under $100,000	Under $25,000	Under $10,000	Under $100,000	Under $25,000	Under $10,000
Mercantile	6.8%	6.8%	6.7%	10.4%	8.2%	7.0%
Security	2.2	2.2	2.2	3.2	3.0	2.9
Subtotal	9.0	9.0	8.9	13.6	11.2	9.9
First National Bank in St. Louis	4.7	4.6	4.5	9.5	7.7	6.6
The Boatmen's National Bank of St. Louis	1.8	1.8	1.8	3.6	2.7	2.2
Bank of St. Louis	2.8	2.8	2.8	3.2	3.1	3.3
Tower Grove Bank and Trust Company	2.8	2.8	2.8	3.3	3.5	3.5
Subtotal	21.1	21.0	20.8	33.2	28.2	25.5
125 other banks	78.9	79.0	79.2	66.8	71.8	74.5
	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

The preceding figures do not reveal any undue concentration of deposits under $100,000 in the resulting bank. These figures suggest that the effect on "local" (accounts under $100,000) competition would not be as great as do the aggregate figures presented earlier in the report. Some competition between the merging banks will be eliminated, but it does not appear that its effect on competition in the market for deposit accounts under $100,000 would be adverse.

There are no industrial banks or mutual savings banks in the metropolitan area. Credit unions, reportedly, are numerous. The 15 largest savings and loan associations in metropolitan St. Louis held aggregate assets of $1.4 billion on December 31, 1964. The area is served by most of the leading insurance companies and 273 offices of various personal loan and sales finance companies. Seven factors operate in the area and various government lending agencies are also active. Competition from banks in other major financial centers is provided by banks in Memphis and Nashville, Tennessee and Dallas, Houston, and San Antonio, Texas which actively solicit business through their development officers in the general St. Louis area. These are considered "competing cities" in the application because of the active solicitation but competition is not limited to these cities. Other major financial centers also offer competition in the area. There appears to be substantial non-bank competition as well as competition from large banks located outside the St. Louis area.

The investigation report is silent as to the opinions of competing bankers and the application does not include information concerning interest rates, loan charges, service charges or the volume of business derived from each others' service area. The application reports that Security has 72 deposit accounts and 41 loans, over $10,000, which are shared with Mercantile but the dollar amount is not revealed.

During 1964 Mercantile participated in 116 loans which it originated in the aggregate amount of $87.5 million of which an aggregate of $41.9 million was retained. Only three of these loans, of which $321,000 was retained, were shared because of legal lending limits. Security originated 49 participation loans aggregating $11.2 million of which $7.5 million was retained. Only four of these were shared because of legal lending limits and of these four loans, $4.2 million was retained. The foregoing does not indicate any material inability to serve large customers although information is lacking on the number and volume of loans which were not accepted because of size.

The ratio of loans to total assets at Mercantile is 52.1% and at Security is 48.2%. Time deposits represent 37.7% of Mercantile's total deposit volume and 41.6% at Security. Deposits of banks represent 18.2% of Mercantile's total deposits as compared to 6.6% for Security, reflecting the former's emphasis on correspondent banking. The following schedule indicates the percentage composition of the merging banks' respective loan portfolios:

Type of Loan	Mercantile (%)	Security (%)
Commercial and industrial	42.9	36.9
Single payment loans to individuals	10.7	14.2
Real estate	9.8	12.9
Brokers and dealers in securities	1.5	0
Other loans on securities	.4	5.4
Loans to financial institutions	9.6	17.8
Instalment loans	20.8	12.8
All other	4.2	0
	100.0	100.0

The July 1964 examination report of Security indicates that President William A. Borders owns 8.8% of the outstanding stock of that bank. Other than the affiliations of the participating banks previously mentioned and the possibility that the resulting bank would be subject to the provisions of the Bank Holding Company Act of 1956 there is no information as to ownership of 5% or more of the stock by any bank or interest in, or holdings by, bank holding companies.

APPENDIX C

DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION TO MERGE SECURITY TRUST COMPANY, ST. LOUIS, MISSOURI, AND MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION, ST. LOUIS, MISSOURI

STATEMENT

On April 30, 1965, Security Trust Company, St. Louis, Missouri, and Mercantile Trust Company National Association, St. Louis, Missouri, applied to the Comptroller of the Currency for permission to merge under the charter and title of the latter.

I. *The Economy of the St. Louis Metropolitan Area.*

The St. Louis Standard Metropolitan Statistical Area (SMSA) as defined by the U. S. Bureau of the Census, includes the City of St. Louis, the Missouri counties of St. Louis, Franklin, Jefferson, and St. Charles, and the Illinois counties of Madison and St. Clair. The area so defined is treated as an economic unit for statistical purposes by numerous public and private agencies, including the Federal banking authorities. The integration of the Illinois counties within the St. Louis area has been facilitated by seven bridges which span the Mississippi River. These will soon be supplemented by three additional bridges which are a part of the Interstate Highway Program.

The area's population of over 2.2 million makes it the tenth largest metropolitan area in the U. S. While the entire area has grown by 500,000 since 1950, the

city has actually declined in population by 100,000. (See Appendix, Table 1.)

St. Louis is making a frontal assault on the problems of urban blight and decay which face most of our major cities. City officials estimate that by 1970 about $2 billion in private and public funds will have been spent in the process of rejuvenation.

Symbolic of the city's renaissance is the 630-foot Gateway Arch, designed by the late Eero Saarinen, which, when completed this year will be the tallest man-made monument in the U. S. The arch will dominate the Jefferson National Expansion Memorial Park, which will occupy 80 acres of what had been a blighted riverfront area.

About ten percent of the city's total area has been or will be razed in the renewal program to make way for modern commercial, industrial, residential, and public facilities. Construction of a 55,000 seat sports stadium and supporting facilities near the Archway park is underway at a cost of $89 million. The $45 million Mansion House project encompasses three 28-story apartment towers and associated commercial and office facilities. Largest of all the renewal projects is that for Mill Creek Valley, which will, by 1970, be a 465 acre industrial, commercial and residential development built at a cost of $200 million. The 220-acre Kosciusko Industrial Park will, when completed, house industrial plants costing about $100 million. A variety of smaller renewal projects are also underway.

Thus massive public and private efforts are being devoted to the task of creating a physical setting

which will allow the St. Louis area to achieve its full economic potential. Despite the current prosperity and abundant evidence of private and public dynamism, there has been some concern on the part of St. Louis leaders that the area, given its natural advantages, is not participating as fully in the national economic advance as might be expected.

These leaders point to such statistics as the following: while total employment in the U. S. was 2.7 percent higher in 1964 than in 1968, the increase for the St. Louis SMSA was 1.5 percent; total manufacturing employment showed about the same differential in the rate of growth, the figures being 1.9 and .8 percent, respectively; while the population of the St. Louis SMSA has been growing, the rate of growth has been somewhat less than the average for all U. S. metropolitan areas. City leaders are hopeful that the massive renewal program and a coordinated industrial development program now being mounted will improve the showing of the St. Louis area in these respects. The emergence of a bank whose capacity is more in keeping with the size of the St. Louis economy will give additional support to these efforts.

The economy of the St. Louis SMSA enjoys a number of natural and man-made advantages. Foremost is the location which allowed the city to become a major transportation center. Situated below the confluence of the Mississippi and Missouri rivers, St. Louis is a key port on a system of 7,000 miles of navigable waterways, linking 29 large cities in 20 states. Over 8 million tons of barge freight is handled in the port of St. Louis each year.

With a highly developed water transportation system, it was logical for other forms of transportation to center here also. St. Louis has become the second largest rail center in the country, being served by 18 trunk line railroads with aggregate trackage of 132,000 miles, about 60 percent of the national total. A new terminal building at the Municipal Airport handles over 120 flights daily of seven scheduled airlines. Eight major U. S. highways pass through St. Louis. Major truck and bus line routes fan out in all directions from the city. Planning and construction are proceeding for a $750 million network of new expressways, which will include inner and outer circumferential beltways.

The St. Louis industrial area is the only one in the country which produces six basic metals: iron, lead, zinc, copper, aluminum, and magnesium. This is made possible by the unique conjunction of the requisite ores and other raw materials within a limited area.

Building on this broad resource base, the economy of the St. Louis SMSA is very well diversified. The St. Louis Chamber of Commerce has published this sample listing of products of the area to illustrate the diversity in manufacturing: atomic reactor feed materials, jet aircraft, ammunition, automobiles and parts, bakery products, beer, bricks, candy, caskets, chemicals, cement, containers (metal, paper, plastic, and glass), drugs and medicines, electrical machinery, food, footwear, furniture, glass products, hardware, iron and steel castings, machinery, machine shop products, meat packing, paints and varnishes, paper prod-

ucts, petroleum refining, piston rings, prepared animal feeds, printing and publishing, rapid transit and railroad cars, refrigeration equipment, roofing, space capsules, steel products, wearing apparel, and wirework.

As of 1963, 3,183 manufacturing establishments employed 267,000 people. The St. Louis SMSA ranks ninth in the country in manufacturing employees and value added by manufacture. The degree of diversification is illustrated by the fact that no more than 19 percent of the total employees worked within any one major industry group, as classified by the Census. (See Appendix, Table 2.)

The largest single employer in the area is the McDonnell Aircraft Corporation, which employs about 35,000 people in its production of F-4 Phantom II fighter-bombers, Gemini and Mercury space capsules, and related products. McDonnell ranked third among all corporations in its receipt of prime military contracts in fiscal 1964. The showing of McDonnell was largely responsible for Missouri's third place among the states, behind only California and New York, in the receipt of prime military contracts in that same year.

Operation of production facilities by General Motors, Ford and Chrysler makes the St. Louis area the third largest location for automobile production in the country.

Since St. Louis is in the center of an important farming region, the handling and processing of agricultural products adds a further dimension to the diversity of the St. Louis economy. A number of lead-

ing meat packing firms have plants in St. Louis, the second largest hog market in the world. Stockyard receipts in 1963 included 2.6 million hogs and almost 700,000 cattle. St. Louis is also a major grain market, with 1963 receipts about 124,000,000 bushels.

In addition to its immediate area, St. Louis serves as the major trading center for an area with a radius of 150 to 200 miles. This fact, coupled with the necessity of handling the demand for goods by the 2.2 million people in the metropolitan area, leads to an impressive volume of wholesale and retail activity. Close to 4,000 wholesale establishments, employing 45,000 people, had total sales of $5.4 billion in 1963. Over 18,000 retail establishments, employing 105,000 people, enjoyed sales of $2.6 billion in the same year. Current retail sales are about 5 percent higher than for the same period last year. Service activities occupy 53,000 employees in 18,000 establishments with total receipts of over a half-billion dollars.

Both industrial corporations and the local universities are rapidly expanding their scientific research activities. In 1964 the St. Louis Research Council was established to attain maximum coordination of the area's research projects and facilities, both academic and industrial.

II. *Method of Acquisition*

The agreement entered into by the participating banks, the Mercantile Trust National Association and the Security Trust, while not unknown in banking circles, is unusual. These banks have entered into an

agreement to merge as provided by 12 U.S.C. 215a. When this agreement is consummated, the corporate existence of Security Trust will blend into and become part of Mercantile Trust which will simultaneously succeed to all right, title and interest in the assets of Security Trust and become responsible for all the latter's liabilities by operation of law. This agreement differs from the usual form of merger agreement in that the consideration passing between the contracting parties is cash rather than the stock of the acquiring bank.

In view of the unusual nature of this proposal, the first inquiry must be directed to its standing under the anti-trust laws. While it may possess the superficial earmarks of a simple purchase of assets and assumption of deposit liabilities, it is in reality a merger under 12 U.S.C. 215a. If it were a simple purchase and sale, the corporate existence of Security Trust must be terminated by a complicated process of liquidation. Here, however, Security Trust, on merger with Mercantile Trust, ceases to exist immediately, without liquidation, in accordance with the provisions of the statute. The question remains as to how this cash merger must be evaluated in the light of § 7 of the Clayton Act and § 1 of the Sherman Act.

The Department of Justice in the advisory opinion submitted to the Comptroller of the Currency pursuant to the Bank Merger Act of 1960 (12 U.S.C. 1828 (c)) considers this proposal to be governed by the decision in *U.S.* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), thereby ignoring the vital differences between this unusual St. Louis proposal and the

normal Philadelphia situation. In the *Philadelphia* case the Supreme Court held that the plan for the consolidation of the Philadelphia National Bank and the Girard Trust Corn Exchange Bank under the charter of the former, whereby the shareholders of the participating banks would exchange their shares in accordance with predetermined ratios for shares in the resulting bank, was a stock acquisition covered by §7 of the Clayton Act, The rationale of the Court was clearly stated. Starting with the statute, the Court said,

> By its terms, the present § 7 reaches acquisitions of corporate stock or share capital by any corporation engaged in commerce, but it reaches acquisitions of corporate assets only by corporations "subject to the jurisdiction of the Federal Trade Commission."

Since, as the Court ruled, the FTC has no jurisdiction over banks, it followed that,

> . . . if the proposed merger be deemed an assets acquisition, it is not within § 7.

Conversely, it must be viewed as a stock acquisition to fall within § 7. This the Court did by reasoning that the merger before them, while neither a pure asset acquisition nor a pure stock acquisition, involved a little of both and so fell under the prohibition intended by Congress.

By reason of the unusual features of this proposal, it does not fall within the ambit of the Court's reasoning in the Philadelphia case. This is a cash merger as contemplated by the terms of 12 U.S.C. 215a. Upon

consummation of this merger, Security Bank will cease its corporate existence; all its assets and liabilities will pass to Mercantile Trust by operation of law. It is a pure asset acquisition by merger. Since the consideration for this merger is cash, to be used to satisfy the interest of Security Trust shareholders, with a concomitant reduction in the capital structure of Mercantile Trust, it cannot be said to be a stock acquisition within the reach of the *Philadelphia* decision.

Whether this proposal comes within the purview of § 1 of the Sherman Act is another question. That Act provides in pertinent part as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

The question to be resolved is whether this proposal, a contract, between two commercial banks is in restraint of trade or commerce. While the Department of Justice in its advisory opinion on the competitive aspects of this proposal says it falls within the proscription of § 1 as interpreted by the Supreme Court in *U. S.* v. *First National Bank and Trust Company of Lexington et al*, 376 U.S. 665 (1964), even a cursory reading of that case reveals that it is distinguishable on its determinative facts from this proposal.

When the First National Bank and Trust Company of Lexington and the Security Trust Company of Lexington consolidated, there were only six commercial banks serving the city, the only concentration of

population in that section of the State of Kentucky. Mr. Justice Douglas, writing for the Court, said that ". . . it is clear that significant competition will be eliminated by the merger." This conclusion rested on the following findings: that "Practically all of the business of the banks in Lexington originates in Fayette County."; that ". . . commercial banks outside Lexington do a negligible amount of business in the county."; that the resulting ". . . bank established by the consolidation was larger than all the remaining banks combined!"; that with respect to trust business, the participating banks "Between them . . . held 98.82% of all trust assets, 92.20% of all trust department earnings, and 79.62% of all trust accounts;"; and that three of the four competing banks testified that the consolidated bank will, by reason of its image of bigness, seriously affect their ability to compete effectively over the years and will tend to foreclose competition in the trust field. The facts surrounding this proposal are significantly different as will be demonstrated hereinafter.

III. *General Character of Management.*

The Bank Merger Act of 1960 lays down seven criteria which must be applied to all bank mergers to determine whether or not they are in the public interest. Three of these, viz., management, effect on competition and the convenience and needs of the community, are particularly significant in this case.

Security Trust is faced with a management problem arising from a lack of men capable of assuming

leadership in the bank. Executive authority rests almost exclusively in the president of Security Trust who is also a substantial shareholder. This vigorous officer is a seasoned and able banker; the problem here lies in lack of depth of competent and trained successors. Competing banks and death have taken his former associates and advisors. Since this application was filed several of his most trusted and dependable aides have died. Despite the competence of Security Trust's president, he has not been able, with his decimated staff, to oversee properly all activities in the bank and to give to each the attention good banking demands. The results of such a situation cannot help but be reflected ultimately in the bank's competitive posture.

IV. *Effect on Competition*

Before proceeding to evaluate the effects of this cash merger on the banking markets involved, including its impact on competition, and to compare it with the situation prevailing in the Lexington case, it is suitable to comment here on the criteria properly to be considered in determining what is the relevant market.

A. The Relevant Market.

In its advisory opinion, the Department of Justice attempts to limit the relevant market to downtown St. Louis. Efforts to assess the competitive impact of this merger in these terms appear to stem from the Supreme Court's compromise in the Philadelphia case in which it equated the relevant market to the four-

county area where branch banking was permitted by state law. Reference was made to Fayette County as the point of reference for assessing the competitive impact in the Lexington case; Kentucky banks may branch only in the county where the main office is located. In the present case in Missouri, a state which prohibits any branch banking, the advisory report would have us look only to the environs of the main offices, an acre or so in downtown St. Louis. Such a correlation of a relevant market to the Missouri anti-branching statutes is not meaningful in this case. We shall demonstrate that neither legal boundaries nor legal branching limitations can fully define the relevant banking market.

Recent discussions of bank mergers have put heavy weight on concentration ratios as a measure of the effect of the merger on competition. Mechanical application of a concentration ratio approach is apparent in the advisory opinion of the Department of Justice on the present case. It is desirable, therefore, to determine the limits of usefulness of concentration ratios as well as the possible pitfalls in indiscriminate use of such ratios.

Calculation of concentration ratios involves a determination of the relevant product line to be analyzed as well as the relevant market area (section of the country). Both of these determinations are more difficult than they may appear.

Appropriate economic analysis of the effect of a bank merger on competition requires consideration of the impact on competition in each of the relevant products or services provided by commercial banks,

taking account of competition from non-bank institutions and of the substitutability among financial services.

Commercial banks deal in a wide range of services and products, and face a substantial amount of competition from non-bank financial institutions. Commercial banks are not products, nor are "total deposits," "total assets" or even "total loans" products. It is a more reasonable approach to the competitive problem to examine *each* of the relevant product lines and determine whether the merger will result in a substantial lessening of competition in the market for that product.

In examining the market for real estate loans, for example, it would be desirable to consider not only the amount of business done by the merging banks and the other commercial banks, but also the mortgage loan business done by mutual savings banks, savings and loan associations, and insurance companies. The same is true in the personal loan field, where commercial banks face intense competition from personal finance companies, sales finance companies and credit unions.

Business loans generally make up the bulk of commercial bank loans, but here also there is considerable competition with other institutions. Savings and loan associations and mutual savings banks make real estate loans to business firms. Finance companies and factors make loans on receivables and equipment. Insurance companies are strong competitors in the large business loan field. Even non-financial firms must be considered, as they extend trade credit to their cus-

tomers. Trade credit is a particularly important alternative to bank loans for small firms.

The one product line in which commercial banks face no direct competition from other financial institutions is in the handling of demand deposits. Even here, however, there are substitutes. Currency, of course, is one alternative. Many savings banks and savings and loan associations sell money orders, as do some supermarkets. Traveler's checks is another alternative.

The Supreme Court's justification in the Philadelphia case for disregarding non-bank competition is that commercial banking products or services enjoy "such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions". As an example, the Court points out that, in competing with small loan companies in the personal loan market, commercial banks have a considerable advantage in that their rates are invariably lower. Nevertheless, there is competition between commercial banks and small loan companies. Perhaps more important, there is competition of both with credit unions and sales finance companies which charge rates comparable to those of the commercial banks.

It has been argued that, even where there are non-bank facilities competing in terms of price and cost with commercial banks, the banks enjoy a preferred position in the minds of consumers and that this preference insulates the banks, to some extent, from competition. This may seem to be the case with savings deposits. Commercial banks do, of course, have some advantages in competing with other savings institu-

tions. The convenience of "one-stop banking," inertia, or lack of knowledge may lead a savings depositor to maintain an account at a commercial bank while a savings bank across the street is paying a somewhat higher interest rate. But this does not mean that there is no competition between the two institutions. The depositor who may not cross the street for an extra one-fourth percent interest may do so for an extra one-half percent. The many commercial banks which have raised their time deposit rates in recent years have not all done so simply because of competition from other commercial banks.

It follows from this analysis that the relevant market area differs for each banking product or service. The relevant market area for personal checking accounts, for example, is typically small although banking by mail has been growing in importance in recent years. The relevant market for large business loans, in contrast, is national. St. Louis banks compete in this latter market with banks in San Francisco and New York as well as those in Kansas City and Chicago. The market for small and medium-size business loans is more difficult to define precisely. Small firms are generally confined to a limited geographical area in seeking funds, both by the cost of travelling and lenders' lack of knowledge of their business. For these loans, the relevant market would appear to be the metropolitan area, although allowance must be made for banks and other institutions on the fringe of the area.

The advisory opinion of the Department of Justice holds that the relevant geographic market area is

downtown St. Louis. As we have stated, the relevant market area varies with the product line. The banking product line with the smallest geographic area is the small-depositor market. Yet it is clear that even for this product line, downtown St. Louis can hardly be considered the relevant area. Few people live in the immediate downtown area. The thousands who work there live elsewhere in the metropolitan area, and have the banking alternatives of the downtown banks and the suburban banks. The individual borrower or depositor has immediate access to banks in the neighborhood of his residence or of his place of employment. Commuting patterns link together all banks in the metropolitan area in one market. Thus, even for these customers, the relevant geographic market is the metropolitan area. With respect to the lending activities of banks, it is even more evident that the metropolitan area will be the smallest relevant market. Business firms, in seeking loans, are able to shop among banks in the entire metropolitan area without being faced with either high travel costs or a bank's unwillingness to make loans outside of the area with which it is familiar.

B. Competition and Banking Regulation.

Whatever the limitations of concentration ratios as a measure of market performance in banking, the entire concept of competition needs careful analysis in its application to banking. In *Brown Shoe Co. v. U. S.*, 370 U.S. 294, 344 (1962), it was held that Congress had indicated a preference for an economy of small businesses operating in unconcentrated indus-

tries. The Court gave no weight to the advantages to consumers resulting from the merger because it assumed that Congress was aware that some inefficiencies would result from its preference for an atomistic industry structure.

> But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Although this argument may be correct when applied to other industries, it is clearly not correct when applied to banking. Congress has clearly stated its preference for goals other than competition in the laws enacted which affect the banking structure. Federal banking legislation has imposed restrictions on bank entry and bank expansion as a means of preventing competition that could endanger the viability of the banking system. Other banking laws and regulations restrict certain activities of banks on the basis of bank size; legal lending limits are the most obvious example. These concepts of the proper relationship of government to banking are fundamentally different from those applied under the antitrust laws to the unregulated industries.

C. Banking Competition in St. Louis.

Although we have many reservations about the use of concentration ratios in analyzing banking markets,

the heavy reliance on this technique in the advisory opinion of the Department of Justice makes imperative a detailed examination here of the situation in St. Louis.

Despite the fact that St. Louis is the tenth largest metropolitan area in the country, the largest bank in St. Louis, Mercantile Trust Company, is only the 42nd largest bank in the United States. It has deposits of individuals, partnerships and corporations of $529.2 million. Mercantile Trust now holds 18.7% of the deposits and 20.9% of the loans of all banks in the St. Louis metropolitan area.

The merging bank, Security Trust, is the 7th largest of the 132 banks in the St. Louis metropolitan area and the smallest of the downtown St. Louis banks. Its $96.1 million of IPC deposits represent about 2.8% of these metropolitan area deposits.

After the merger, the resulting bank will ostensibly hold 21.4% of area deposits and 23.6% of area loans. It has been estimated that there will be an attrition of about 2% of deposits since it is reasonable to expect that not all customers of the closing bank will transfer their business to the survivor. Other St. Louis banks will undoubtedly gain deposits as a result of this merger.

It is useful in evaluating the significance of this increase in concentration ratios to compare the St. Louis banking structure with that of other large metropolitan areas. As of mid-1962, the percentage of total commercial bank deposits in the St. Louis metropolitan area held by the largest bank was 18.1%. The

figure was higher than this in 76 of the other 80 large metropolitan areas included in a Federal Reserve study (see Appendix, Table 3). When the percentages of deposits held by the two largest banks are considered, the figure of 34.9 for St. Louis was exceeded in 75 of the other 80 areas. The same two ratios for the St. Louis metropolitan area had not changed significantly by mid-1964; the percentage of area deposits held by the largest bank was then 18.7%, a very slight increase, while the percentage held by the two largest banks had declined slightly, to 34.3%. If we interpose the post-merger estimate of 21.4% on the mid-1962 tabulation of concentration ratios for the other 80 metropolitan areas, we find that it would be exceeded in 69 of the 80 other areas. Even when only unit banking metropolitan areas are considered, only 3 of 21 such areas will have concentration ratios lower than St. Louis after the merger.

While the effect of this merger on aggregate concentration ratios is thus small, it is important to examine more specifically which borrowers and markets are affected by this increase in concentration. For this purpose, it is useful to consider two types of borrowers—large and small firms.

The large firms seek funds in the national financial market. Large banks all over the country compete in this market, and a merger of two banks can have only a negligible adverse effect on competition. In this merger, moreover, the competitive effect is favorable, on balance, since Security, because of its limited size, is not a significant participant in the national mar-

ket, and Mercantile's ability to compete after the merger will be enhanced.

Small firms are largely limited to banks in their immediate metropolitan area in seeking loan funds. The small manufacturer or merchant in St. Louis may seek a loan from a suburban bank or from a downtown St. Louis bank. He cannot ordinarily expect to borrow from banks in Chicago or New York. Even here, however, the effect of this merger is less than it may appear from gross concentration ratios. Mercantile's business is mainly with large firms; nearly two-thirds of its deposits are in accounts of over $100,000. Correspondent banking business is also important to Mercantile; deposits of banks represent 18% of Mercantile's deposits. Its business and bank customers are scattered across the country. It is usually classified as a wholesale bank. Security, on the other hand is basically a retail bank, dealing with individuals and small firms in a more limited area. Nearly 40% of its deposits are in accounts of under $10,000. Competition between the two banks is much more limited than gross deposit totals imply.

This is not to say that Mercantile and Security do not compete. They do compete for small business and individual accounts in the metropolitan St. Louis area. But Mercantile by no means has a dominant position in this market. The FDIC has examined the distribution of accounts of less than $10,000 in the St. Louis metropolitan area. Whereas Mercantile holds 18.7% of total deposits in the metropolitan area, it holds only 7.0% of funds in accounts under $10,000. Add-

ing Security's 2.9% of such accounts brings the combined bank's share of this business to only 9.9%. The resulting increase in concentration in this product line (small business and individual accounts) is thus clearly negligible.

V. *Convenience and Needs of the Community.*

The comparison in Part IV of the concentration ratios in St. Louis banking with those in other major metropolitan areas shows conclusively that the St. Louis SMSA does not have the services of a bank as large, relative to the size of its economy, as that in nearly all other metropolitan areas. While the St. Louis SMSA ranks tenth in the country in population, its largest bank, Mercantile Trust, ranks 42nd. All but one of the areas larger than St. Louis have at least one bank larger than Mercantile Trust. Nine areas with fewer people than the St. Louis area have a larger bank than does St. Louis.

A number of persuasive factors, indicate that the economy of the St. Louis SMSA would benefit from the services of a larger bank than is now present. In Part I, it was noted that while the St. Louis area is prosperous today, there has been considerable concern about its failure to match the growth in employment, population and new industry experienced in some comparable areas. Giant strides have been taken to improve the physical and economic setting for industry. One further step is that entailed in this merger, which will provide a bank better able to meet the financial requirements of the larger firms with rapidly growing operations in the St. Louis area.

It is useful to note that each of the five U. S. cities which have surpassed St. Louis in population during the past five decades has at least one bank larger than any in St. Louis. Further, eight of the nine metropolitan areas which have fewer people but at least one bank larger than any in St. Louis are growing at a faster rate than is the St. Louis area.

The breadth of services offered is related to bank size. A very large bank will have a sufficient volume of loans to specific industries to hire loan officers who are experts on these industries. The combination of banking and industry expertise held by these men benefits all their customers, large and small.

The rates of growth of a number of industrial corporations with major operations in the St. Louis area have outdistanced the rates of growth of the major St. Louis banks in recent years. (See Appendix, Table 4.) For example, the rates of growth in total assets between 1950 and 1963 was as follows for these corporations: Brown Shoe Co., 319 percent; Emerson Electric Co., 505 percent; Granite City Steel Co., 1582 percent; McDonnell Aircraft Corp., 794 percent; Monsanto Co., 540 percent. In contrast, the comparable figure for Mercantile Trust was 109 percent.

Obviously, as local corporations expand to national operations, they will tend to enter the national loan market. Thus, it is not implied that local banks should be able to service all or even most of their credit needs. However, the ability of local banks to retain a reasonable proportion of these corporations's business will be beneficial for the borrowers and the local economy, as well as the banks. For example, the Mon-

santo Co., a St. Louis-based corporation, has just completed arrangements for a $100 million loan. The company found it necessary to secure $88 million of this outside St. Louis; only three St. Louis banks were able to participate in the remaining $12 million. Because of the limited capacity of St. Louis banks, growing St. Louis corporations are having to place ever-greater reliance on Eastern and Chicago banks.

Although the legal lending limit of Mercantile will decline slightly because of the terms of the merger, the larger lending limit of Mercantile will apply to all the assets of Security. The acquisition of the deposits of Security Trust will bring the relationship between the lending limit and the deposits of Mercantile to a figure more nearly in accord with accepted banking practice. Mercantile is currently somewhat overcapitalized, ranking 42nd nationally in assets but 33rd in capital. As a result of the acquisition, the actual lending capacity of Mercantile will be increased. The larger resources of the resulting bank will allow greater loan diversification to be achieved so that the bank will be willing to approach its legal lending limit for individual loans more often than is now the case.

Large creditors will not be the only beneficiaries of the greater lending capacity of the resulting bank. The massive St. Louis urban renewal program has required a tremendous volume of credit. Mercantile and the other St. Louis banks have helped to meet these credit needs to the extent they were able to do so. For example, Mercantile's participation in the Downtown Sports Stadium project was crucial. The Mansion

House project was more than $1 million short of the funds required to secure a Federal Housing Authority commitment until Mercantile came to the rescue. Mercantile has also participated in the financing of the Gateway Arch, the Mill Creek Valley project, the Kosciusko Industrial Park, and the Bi-State Transportation Authority operations, among others.

It is from St. Louis that financial aid must come to improve the economies of Southern Illinois and the rural areas of Missouri. Increasing the capacity of St. Louis' largest bank is likely to facilitate this flow of funds.

We cannot ignore, in considering this merger, the prohibition on branching faced by the banks in Missouri. This natural avenue of bank growth is not available to St. Louis banks. This is a major reason for the failure of the large downtown banks to keep pace with the growth of the economy of the St. Louis area. The population of the city of St. Louis has declined from 857,000 in 1950 to 739,000 in 1963, while the population of the area has increased by over 500,000. (See Appendix, Table 1.) As could be expected, the deposits of city banks have grown much more slowly than have those of suburban banks. In the past decade, for example, while deposits of city-based banks have increased by 27 percent, deposits of banks in major suburban areas have increased by as much as 165 percent. If the city banks could have followed the population movement by branching, they would have been able to keep abreast of the overall economic and industrial growth and this merger might not have been required.

Public policies toward bank mergers, charters and branches can best be evaluated as a unified whole, since all these policies shape the banking structure. With branching prohibited, the chartering of a new bank is the only way to provide new banking facilities, and merger may, on occasion, be required to allow the banking needs of certain customers to be met. The ideal of a balanced banking structure, capable of meeting the legitimate banking needs of all customers, large and small, may be achieved in non-branch states through judicious application of chartering and merger policy.

In St. Louis, 132 commercial banks, 29 more than were operating 10 years ago, now serve the metropolitan area. An examination of the deposit distribution of the St. Louis banks, as it will be after this merger is consummated, indicates a desirable balance in the banking structure. (See Appendix, Table 5.) To the extent that varying sizes of banks are required to meet the differing needs of customers, large banks, as well as medium and small, are imperative to serve adequately an urban area. The effect of this merger is to increase this range; a bank larger than heretofore available will emerge in St. Louis, while a number of banks, which have operations comparable with those of the disappearing bank will remain.

VI. *Conclusion*

Having considered the subject application in the light of the statutory criteria, we find the proposed merger to be in the public interest and it is, therefore, approved effective on or after June 30, 1965.

/s/ James J. Saxon
JAMES J. SAXON
Comptroller of the
Currency

Dated: June 24, 1965

Table 1

Population of the St. Louis Metropolitan Area

Government Unit	1950	1960	1968	Percentage Change 1950-1968
Missouri:				
St. Louis City	856,796	750,026	739,000	- 13.7
St. Louis County	406,349	703,532	813,000	100.1
Franklin County	36,046	44,566	48,000	33.2
Jefferson County	38,007	66,877	76,000	100.0
St. Charles County	29,834	52,970	60,000	101.1
Illinois:				
Madison County	182,307	224,689	239,000	31.1
St. Clair County	205,995	262,509	284,000	37.9
Total, Metropolitan Area	1,755,334	2,104,669	2,258,000	28.6

Table 2

Manufacturing Establishments, Employees, and Value Added by Major Industry Groups, St. Louis Metropolitan Area, 1963

Industry Groups	Establishments December 31, 1963	All Employees December 31, 1963	Percent of Total Employees	Value Added by Manufacture 1963 (thousands of $)	Percent of Total Value Added
Total manufacturing	3,183	266,950	100.0	2,536,508	100.0
Food and kindred products	376	30,015	11.2	278,369	11.0
Tobacco products	5	—	—	—	—
Textile mill products	24	—	—	—	—
Apparel and related products	199	12,787	4.8	62,104	2.4
Lumber and wood products	95	1,288	0.5	9,895	0.4
Furniture and fixtures	110	4,283	1.6	29,166	1.1
Paper and allied products	125	9,471	3.5	81,799	3.2
Printing and publishing	484	15,680	5.9	123,140	4.9
Chemical and allied products	251	19,230	7.2	354,332	14.0
Petroleum and coal products	30	5,924	2.2	108,569	4.3
Rubber and plastic products	66	1,554	0.6	14,870	0.6
Leather and leather products	74	9,464	3.5	55,870	2.2
Stone, clay, and glass products	178	7,862	2.9	107,996	4.3
Primary metal products	103	21,028	7.9	171,114	6.7
Fabricated metal products	345	17,936	6.7	176,722	7.0
Machinery, except electrical	354	20,496	7.7	187,300	7.4
Electrical machinery	95	15,469	5.8	138,143	
Transportation equipment	61	55,758	20.9	488,531	19.3
Instruments and related products	46	6,310	2.4	36,542	1.4
Miscellaneous manufacturing	154	9,969	3.7	96,289	3.8

Table 3

CONCENTRATION OF COMMERCIAL BANK DEPOSITS IN LARGEST METROPOLITAN AREAS, JUNE 30, 1961

Area	Number of banking facilities	Total deposits (in millions of dollars)	Per cent of deposits: Two largest banks	Per cent of deposits: Largest bank
States with statewide branch banking				
Fresno, Calif.	7	438	76.8	39.3
Providence-Pawtucket, R.I.-Mass.	11	889	65.3	51.5
	8	555	80.9	49.8
Phoenix, Ariz.	11	535	88.3	47.0
Sacramento, Calif.	11	998	88.9	44.7
Wilmington, Del.-N.J.	14	764	84.0	43.9
Hartford, Conn.	7	298	86.3	
Bridgeport, Conn.	6	311		
New Haven, Conn.	15	746	80.4	41.7
San Bernardino-Riverside-Ontario, Calif.	9	852	83.9	41.7
San Jose, Calif.	8	1,046	86.4	41.5
San Diego, Calif.	25	8,399	69.1	41.1
San Francisco-Oakland, Calif.	11	6,700	76.0	39.6
Honolulu, Hawaii	21	1,353	90.7	39.2
Seattle, Wash.	19	1,243	79.2	36.1
Portland, Oreg.-Wash.	16	989	67.8	
Tacoma, Wash.	12	1,152	85.4	35.8
Los Angeles-Long Beach, Calif.	41	11,515	69.2	28.9
Baltimore, Md.	33	4,288	56.2	28.0
Salt Lake City, Utah	18	818	88.7	27.8
Washington, D.C.-Md.-Va.	41	2,323	57.7	21.8
States with limited branch banking				
Birmingham, Ala.	7	638	86.7	32.1
Toledo, Ohio	13	923	83.1	31.9
Pittsburgh, Pa.	38	3,961	78.2	29.9
Norfolk-Portsmouth, Va.	18	776	72.3	29.8
Grand Rapids, Mich.	15	1,117	71.2	29.4
Buffalo, N.Y.	22	2,263	79.5	29.1
Worcester, Mass.	11	1,263	67.6	28.4
Akron, Ohio	13	1,388	66.4	28.3
Mobile, Ala.	7	663	83.3	28.2
Rochester, N.Y.	14	1,388	85.8	28.2
Memphis, Tenn.	9	2,265	81.0	27.9
Nashville, Tenn.	14	1,754	79.9	27.5
Dayton, Ohio	13	1,353	77.3	27.3
Indianapolis, Ind.	14	2,224	76.3	26.8
Flint, Mich.	7	1,228	73.9	26.1
Knoxville, Tenn.	11	418	73.8	25.9
Little Rock, Ark.	11	648	65.9	25.8
Boston, Mass.	33	4,098	77.8	25.2
Detroit, Mich.	44	5,647	53.2	24.6
Cleveland, Ohio	41	3,724	54.5	24.5
New Orleans, La.	34	1,233	58.9	24.2
Albany-Schenectady-Troy, N.Y.	19	1,067	55.9	25.6
Richmond, Va.	11	723	52.9	25.5
Syracuse, N.Y.	11	633	51.7	25.3
Springfield-Chicopee-Holyoke, Mass.	11	354	54.7	24.7
Gary-Hammond-East Chicago, Ind.	23	439	51.2	24.2
Atlanta, Ga.	22	1,661	51.0	23.9
Cincinnati, Ohio-Ky.	33	1,772	52.2	23.8
Jersey City, N.J.	11	818	52.8	23.8
Louisville, Ky.-Ind.	19	1,088	52.8	23.8
Harrisburg, Pa.	15	328	54.4	23.7
Youngstown-Warren, Ohio	14	727	54.4	23.6
Canton, Ohio	13	538	53.8	23.1
Newark, N.J.	43	2,268	53.1	23.0
Philadelphia, Pa.-N.J.	33	8,724	53.1	22.9
New York, N.Y.	88	15,724	53.0	22.8
Wilkes-Barre-Hazleton, Pa.	12	638	52.6	22.8
Allentown-Bethlehem-Easton, Pa.-N.J.	37	897	51.8	22.7
Paterson-Clifton-Passaic, N.J.	41	1,468	50.6	22.6
States with unit banking				
Minneapolis-St. Paul, Minn.	63	2,403	43.7	21.4
El Paso, Tex.	8	311	63.0	20.9
Wichita, Kans.	8	623	60.0	20.8
Milwaukee, Wis.	34	1,459	51.1	20.8
Omaha, Nebr.-Iowa	23	1,173	48.1	20.7
Fort Worth, Tex.	17	1,031	49.1	20.6
Tulsa, Okla.	15	666	49.6	20.5
Jacksonville, Fla.	13	833	49.1	20.4
Oklahoma City, Okla.	23	1,088	49.1	20.3
Dallas, Tex.	31	3,268	49.1	20.2
Orlando, Fla.	11	1,113	49.1	20.2
San Antonio, Tex.	15	765	49.1	20.2
Houston, Tex.	34	2,726	49.1	20.1
Beaumont-Port Arthur, Tex.	17	885	49.1	20.1
Denver, Colo.	21	1,459	49.1	20.1
Kansas City, Mo.-Kans.	41	1,973	49.1	20.1
Chicago, Ill.	211	3,031	49.1	20.1
St. Louis, Mo.-Ill.	118		49.1	20.1
Fort Lauderdale-Hollywood, Fla.	11	411	49.1	20.1
Tampa-St. Petersburg, Fla.	41	942	49.1	20.1
Miami, Fla.	63	2,403	71.4	21.4
Wichita Falls, Tex.	8	311	63.0	20.9
Lubbock, Tex.	8	623	60.0	20.8
Austin, Tex.	34	1,459	51.1	20.8
Lincoln, Nebr.	23	1,173	48.1	20.7
Shreveport, La.	17	1,031	49.1	20.6
Corpus Christi, Tex.	15	666	49.6	20.5
Waco, Tex.	23	1,088	49.1	20.3
Tucson, Ariz.	31	3,268	49.1	20.2
Des Moines, Iowa	11	1,113	49.1	20.2
Abilene, Tex.	15	765	49.1	20.2
Sioux Falls, S.Dak.	34	2,726	49.1	20.1
Amarillo, Tex.	17	885	49.1	20.1
Topeka, Kans.	21	1,459	49.1	20.1
Sioux City, Iowa-Nebr.	41	1,973	49.1	20.1
Lubbock, Tex.	211	3,031	49.1	20.1
Wichita Falls, Tex.	118		49.1	20.1
Austin, Tex.	11	411	49.1	20.1
Lincoln, Nebr.	41	942	49.1	20.1

[1] All banks in an area that were controlled by one holding company were considered as a single bank and their deposits were added together.

Note.—The "largest metropolitan areas" are the Census Bureau's standard metropolitan statistical areas with populations of 250,000 or more.

Source: Federal Reserve Bulletin September 1963.

Table 4

Growth of Total Assets of Selected St. Louis Manufacturing Corporations and Major St. Louis Banks, 1950-1963

Firms	1950	1963	Percentage Increase
Manufacturing Corporations:			
Brown Shoe Co.	36,496,324	153,064,874	319.4
Emerson Electric Manufacturing Co.	20,526,096	124,226,372	505.2
Granite City Steel Co.	12,808,187	215,384,376	1581.6
Laclede Steel Co.	19,117,241	51,447,320	169.1
McDonnell Aircraft Corp.	22,430,723	200,611,452	794.4
Monsanto Co.	221,377,051	1,416,072,000	539.7
Ralston-Purina Co.	87,808,998	333,799,467	280.1
Banks:			
Mercantile Trust Co., N.A.	413,143,670	861,756,865	108.6
First National Bank in St. Louis	522,233,687	742,574,933	42.2
Boatmen's National Bank	164,394,000	255,508,000	55.4
Bank of St. Louis	96,914,000	150,372,000	55.2

Table 5

Deposits of Metropolitan St. Louis Area Banks
June 30, 1964

Banks	Amount (Thousands of $)	Percent of Total SMSA Deposits
Mercantile Trust Co. N.A.		
(Includes Mercantile-Commerce National Bank)	750,933	18.66
Add Security Trust Co.	111,363	2.77
Total, resulting bank	862,296	21.43
First National Bank in St. Louis	628,599	15.62
Boatmen's National Bank	233,275	5.80
Bank of St. Louis	140,892	3.50
National Stock Yards National Bank (Ill.)	113,206	2.81
St. Louis County National Bank (Clayton)	104,428	2.60
Tower Grove Bank and Trust Co.	99,565	2.47
Manufacturers Bank and Trust Co.	67,265	1.67
Manchester Bank	63,005	1.57
State Bank and Trust Co. (Wellston)	55,979	1.39
Jefferson Bank and Trust Co.	50,887	1.26
Southwest Bank	47,165	1.17
Lindell Trust Co.	44,645	1.11
First National Bank and Trust Co. (Alton, Ill.)	38,954	0.97
117 additional banks	1,473,795	36.63
Total	4,023,956	100.00

[SEAL]

THE ADMINISTRATOR OF NATIONAL BANKS
Washington

DECISION OF THE COMPTROLLER OF THE CURRENCY UNDER THE BANK MERGER ACT OF 1966 REGARDING THE MERGER OF MERCANTILE TRUST COMPANY N.A. AND SECURITY TRUST COMPANY IN ST. LOUIS, MISSOURI

STATEMENT

On the basis of facts within the knowledge of the Office of the Comptroller at this time, many of which were detailed in this Office's opinion dated June 24, 1965, the Office of the Comptroller of the Currency has concluded that the convenience and needs of the community served by Mercantile Trust Co. N.A. clearly outweighs the insignificant effect which the merger of that bank with Security Trust Co. has had or probably will have upon competition in the community; and that it is in the public interest to permit the merger of these two institutions.

The reconsideration of this transaction is for the purpose of complying with the terms of the Bank Merger Act of 1966.

/s/ James J. Saxon
JAMES J. SAXON
Comptroller of the
Currency

Dated: September 13, 1966

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

Civil Action No. 65 C-241(1)

Filed: July 7, 1965

UNITED STATES OF AMERICA, PLAINTIFF

v.

MERCANTILE TRUST COMPANY, NATIONAL ASSOCIATION and SECURITY TRUST COMPANY, DEFENDANTS

COMPLAINT

The United States of America, by its attorneys acting under the direction of the Attorney General of the United States, brings this action against the defendants named herein, and complains and alleges as follows:

I

Jurisdiction and Venue

1. This complaint is filed and this action is instituted against the defendants named herein under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, and under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended, entitled, "An Act to supplement existing

laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act and Section 7 of the Clayton Act, 38 Stat. 731, as amended by the Act of Congress of December 29, 1950, c. 1184, 64 Stat. 1125.

2. Each of the defendants has its principal place of business, transacts business, and is found within the Eastern District of Missouri.

II

The Defendants

3. The Mercantile Trust Company National Association, hereinafter referred to as "Mercantile Trust," is made a defendant herein. Mercantile Trust is a national banking association organized under the laws of the United States of America, with its principal place of business in St. Louis, Missouri.

4. The Security Trust Company, hereinafter referred to as "Security Trust," is made a defendant herein. Security Trust is a State banking association organized under the laws of the State of Missouri, with its principal place of business in St. Louis, Missouri.

III

Trade and Commerce

5. Commercial banks fill an essential and unique role in the Nation's economy. Most money payments are made through the device of demand deposits, a

function common to all commercial banks and unique to them. Through the making of loans to individuals and business borrowers commercial banks supply a significant part of the credit requirements of our economy. Commercial banks also accept time deposits from various types of depositors and most commercial banks provide a wide variety of other financial services, including personal and corporate trust accounts, the collection of drafts, bills, and other commercial instruments; the acceptance of bills of exchange; the issuance of letters of credit; the sale of cashiers' checks, and drafts on correspondent banks; the purchase or sale of securities for customers; and the renting of safety deposit boxes. This combination of services is unduplicated by other financial institutions.

6. Commercial banks, because of the importance of bank credit to business borrowers and their close relationship with many such borrowers, and because of their holdings of stock in trust accounts, have an important influence on competition in all branches of industry and commerce served by the banking system.

7. Both of the defendants are commercial banks and engage in a full line of commercial banking services which include the operation of a trust department. Both banks receive deposits from and serve persons located in states other than the State in which they are located. The banks regularly use interstate communications, including the mails, telephone and telegraph, to conduct their banking business with customers, and with other banks located in other states. The defendants, Mercantile Trust and Security Trust, are both engaged in interstate commerce.

8. The area in which the merger of Mercantile Trust and Security Trust will have its most immediate and direct competitive effect is the area in and around the city of St. Louis, Missouri, where both banks have their principal places of business. The two banks are located directly across the street from each other downtown in the city of St. Louis.

9. Mercantile Trust is the largest commercial bank in the city of St. Louis and in the entire State of Missouri, and is the 42nd largest commercial bank in the United States. It is also one of the leading corporate trustees in the Nation. There being a prohibition against branch banking in the State of Missouri, Mercantile Trust conducts its commercial banking business at one principal banking office in downtown St. Louis. It also operates a limited service drive-up facility in downtown St. Louis a few blocks from its main office. As of February 28, 1965, Mercantile Trust had total assets of $876,766,000, total deposits of $737,448,000, total net loans and discounts of $456,657,000, and total capital accounts of $106,772,000.

10. In addition to the banking business directly controlled by Mercantile Trust, that bank also controls the Mercantile-Commerce National Bank, a national banking association which conducts a general commercial banking business at one principal banking office in the city of St. Louis. The stock of Mercantile-Commerce is presently held in a voting trust for the benefit of Mercantile Trust stockholders. Five of Mercantile Trust's directors sit on the Board of

Mercantile-Commerce and one of these is also President of Mercantile-Commerce. As of December 31, 1964, Mercantile-Commerce had total assets of $48,937,000, total deposits of $42,093,000, net loans and discounts of $20,697,000 and total capital accounts of $2,748,000.

11. Security Trust is the fifth largest commercial bank in the city of St. Louis. It conducts a general commercial banking business at one principal banking office in downtown St. Louis. It also operates a limited service drive-up facility in downtown St. Louis several blocks from its main office. As of February 28, 1965, Security Trust had total asset of $123,938,000, total deposits of $110,425,000, total net loans and discounts of $59,816,000, and total capital accounts of $11,480,000.

12. Mercantile Trust's share of total deposits and total loans held by commercial banks competing in the city of St. Louis is presently 30.8% and 32.6%, respectively, including the deposits and loans of its subsidiary Mercantile-Commerce. Giving effect to the proposed merger, Mercantile Trust's share of the total deposits and loans will increase to 34.9% and 36.6%, respectively.

13. Commercial banking in the city of St. Louis is highly concentrated. The two leading banks, Mercantile Trust and The First National Bank in St. Louis, account for 55.5% of the total deposits and 56.1% of the total loans held by the 25 banks in the city of St. Louis. The proposed merger, if effected, would increase these shares to 59.6% and 60.1%, respectively. The three largest banks in St. Louis plus

the four St. Louis banks controlled by the General Bancshares Incorporated presently control 72.7% of the total deposits and 73.6% of the total loans held by the banks in the city of St. Louis. The proposed merger, if effected, would increase these shares to 76.8% and 77.6%, respectively.

14. As a result of the proposed merger, Mercantile Trust would control between 21.5% and 23.6% of the deposits and between 23.6% and 24.6% of the loans held by all banks competing in and around the city of St. Louis.

15. Mercantile Trust and Security Trust, the first and fifth largest commercial banks in the city of St. Louis, respectively, are located on opposite sides of the same street in downtown city of St. Louis. Both banks compete extensively to serve and obtain the deposits of individuals and businesses in St. Louis. These two defendant banks are significant competitors with each other and with other banks located in and around the city of St. Louis in performing commercial banking functions, as described in paragraph 5 above.

IV

Offenses Charged

16. Beginning some time prior to April 21, 1965 and continuing thereafter up to and including the date of the filing of this complaint defendants Mercantile Trust and Security Trust have been engaged in an unlawful combination in unreasonable restraint of the above described interstate trade and commerce in violation of Section 1 of the Sherman Act.

17. The unlawful combination has consisted of a continuing agreement, understanding and concert of action between the defendants Mercantile Trust and Security Trust, the substantial terms of which have been and are that the defendants will carry out a joint plan of merger which will eliminate all competition between them. To carry out the combination is unreasonable restraint in the above described interstate trade and commerce, the defendants have entered into a contract which was approved by the Boards of Directors of Mercantile Trust and Security Trust on or about April 21, 1965, which, if carried out, will result in a merger of the two defendants and will eliminate all competition between them in violation of Section 1 of the Sherman Act.

18. The effect of the merger of Mercantile Trust and Security Trust, pursuant to the agreement described in paragraph 17 above, may be substantially to lessen competition and to tend to create a monopoly in violation of Section 7 of the Clayton Act in the following ways, among others:

(a) Competition between Mercantile Trust and Security Trust will be completely and permanently eliminated;

(b) Competition generally in commercial banking in the area in and around the city of St. Louis will be substantially lessened and a tendency to monopoly created; and

(c) Concentration in commercial banking in the area in and around the city of St. Louis will be substantially increased.

19. The offenses alleged in this complaint are continuing and will continue unless the relief hereinafter prayed for is granted.

Prayer

WHEREFORE, plaintiff prays:

1. That the aforesaid agreement between Mercantile Trust and Security Trust be adjudged to be unlawful, in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act.

2. That defendants Mercantile Trust and Security Trust and all persons acting on their behalf be enjoined from carrying out the agreement of merger or any similar plan or agreement, the effect of which would be to merge or consolidate said defendants.

3. That a preliminary injunction issue against the defendants Mercantile Trust and Security Trust preventing and restraining them from taking any further action to consummate the aforesaid agreement, or any similar agreement, understanding, or plan to merge or consolidate Security Trust with Mercantile Trust pending adjudication of the merits of this complaint.

4. That in the event the aforesaid agreement results in a merger of defendants prior to the issuance of a preliminary injunction as herein requested:

(a) The merger of defendants be adjudged and decreed unlawful in violation of Section 1 of the Sherman Act and Section 7 of the Clayton Act.

(b) The defendant Mercantile Trust be required to divest itself of all shares of stock, assets, and other properties of defendant Security Trust acquired by and through the merger of defendants and to re-establish Security Trust as an independent, viable, competitive entity.

(c) The defendants be required to take such other action as may be necessary and appropriate to dissipate the effects of their unlawful activities as hereinbefore alleged and to restore competition in commercial banking in the area in and around the city of St. Louis.

5. That the plaintiff have such other and further relief as the Court may deem just and proper.

6. That plaintiff recover the costs of this action.

/s/ Nicholas deB. Katzenbach
NICHOLAS DEB. KATZENBACH
Attorney General

/s/ Donald F. Turner
DONALD F. TURNER
Acting Assistant Attorney General

/s/ Donald M. Melchior
DONALD F. MELCHIOR
Attorney, Department of Justice

/s/ Richard D. Fitzgibbon
RICHARD D. FITZGIBBON, JR.
United States Attorney

/s/ Lawrence F. Noble
LAWRENCE F. NOBLE

/s/ Barry J. Waldman
BARRY J. WALDMAN
Attorneys,
Department of Justice

AFFIDAVIT

DISTRICT OF COLUMBIA)
) ss:
WASHINGTON, D. C.)

LAWRENCE F. NOBLE, being duly sworn, deposes and says that he is an attorney employed by the Antitrust Division of the Department of Justice; that he has been actively engaged in the preparation of this action; that he has read the foregoing Complaint and knows the contents and is familiar with the subject matter thereof; that he is informed and believes that the allegations of fact contained therein are true; and that the sources of his information are written statements made by the defendants in their Application to the Comptroller of the Currency for approval to merge and information obtained from recognized trade sources.

LAWRENCE F. NOBLE
Attorney, Department of Justice

Subscribed and sworn to before
me this 28th day of June, 1965.

Notary Public

APPENDIX E

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> * * * *

Section 18(c) of the Bank Merger Act, as amended, 80 Stat. 7, 12 U.S.C. 1828(c) (1966 Supp.), provides in pertinent part:

> (5) The responsible agency shall not approve—
>
> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or
>
> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen com-

petition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

* * * *

(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issue presented.

(7)(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of [Title 15], the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 13 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19~~66~~ 67.

No. ~~1265~~ 87

UNITED STATES OF AMERICA,
Appellant,

v.

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION, SECURITY TRUST COMPANY and WILLIAM B. CAMP,
Comptroller of the Currency,
Appellees.

On Appeal From the United States District Court for the Eastern District of Missouri.

MOTION TO AFFIRM.

THOMPSON MITCHELL DOUGLAS & NEILL,
JAMES M. DOUGLAS,
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705 Olive Street,
St. Louis, Missouri 63101,
Attorneys for Appellee, Mercantile Trust Company National Association.

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St., 63101. CHestnut 1-4477.

INDEX.

Page

Statement 2

Argument 4

CITATIONS.

Cases:

United States v. First City National Bank of Houston (No. 914, O. T. 1966) 5, 6, 7, 13, 14

United States v. Philadelphia National Bank, 374 U. S. 321 ..... 4, 5

Statutes:

Bank Merger Act of 1966, 80 Stat. 7, 12 U. S. C. 1828 (c) (1966 Supp.), as amended 2, 6, 7

Bank Merger Act of 1960, 12 U. S. C. 1828 ..... 4, 6

Clayton Act, 15 U. S. C. 18, as amended 2

Expediting Act of February 11, 1903, Section 2, 15 U. S. C. 29 2

Public Law 89-356, Section 2 (c) 6

Sherman Act, 15 U. S. C. 1 2

Supreme Court Rule 16, as amended 1

Legislative History:

House of Representatives Report No. 1221, 89th Congress, 2d Session (1966) 8, 17, 18

Congressional Record, 2/8/66

Page 2349 8

Page 2343 9

Page 2337 9

Page 2339 9

Page 2341 9

Page 2342 9
Page 2336 10
Page 2333 13
Page 2342 14
Page 2358 15

Congressional Record, 2/9/66
Page 2551 19

Miscellaneous:

Record of Preliminary Hearing in the District Court of the United States for the Eastern District of Missouri, July 14, 1965 16

Plaintiff's Exhibits From Record of Preliminary Hearing:

1. Reports of Federal Deposit Insurance Corporation and Board of Governors of the Federal Reserve System 17

3. Justice Department Letter of May 14, 1965, to Senator Hart 16

Defendant's Exhibits From Record of Preliminary Hearing:

K—Decision of the Comptroller of Currency on the Application to Merge Security Trust Company and Mercantile Trust Company National Association 17

X-1—Testimony of the then head of the Antitrust Division of the Justice Department before a Senate Subcommittee on April 21, 1965 16

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 1269.

UNITED STATES OF AMERICA,
Appellant,

v.

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION, SECURITY TRUST COMPANY and WILLIAM B. CAMP,
Comptroller of the Currency,
Appellees.

On Appeal From the United States District Court for the Eastern District of Missouri.

MOTION TO AFFIRM.

Pursuant to Rule 16 of the Revised Rules of this Court, Appellee Mercantile Trust Company National Association moves that the judgment of the District Court be affirmed on the ground that the questions raised by Appellant are so insubstantial as not to warrant further argument.

STATEMENT.

This is a direct appeal pursuant to Section 2 of the Expediting Act of February 11, 1903, 15 U. S. C. 29, from the dismissal by the District Court of the Appellant's Complaint which alleged as its cause of action that the merger of Mercantile Trust Company National Association and Security Trust Company constituted a violation of § 1 of the Sherman Act, 15 U. S. C. 1, and § 7 of the Clayton Act, 15 U. S. C. 18. Subsequent to the filing of the Complaint and the consummation of the merger between the two banks, Congress passed the Bank Merger Act of 1966 (BMA 66), 80 Stat. 7, 12 U. S. C. 1828 (c) (1966 Supp.).

After the passage of BMA 66 this Appellee as well as the Comptroller of the Currency, the Intervenor, filed motions to dismiss the Complaint on the ground that it failed to state a cause of action in view of the passage of BMA 66. The District Court after hearing, sustained these motions but granted Appellant leave to amend its Complaint. When no amendment was filed, the Complaint was dismissed.

The Jurisdictional Statement filed by the Appellant states that the issue presented is whether BMA 66 requires the Government to establish in actions challenging bank mergers that any anti-competitive effects are not clearly outweighed by the beneficial effect of the merger in meeting the convenience and needs of the community to be served. The issue is in fact much more narrow and specific. The issue raised by this appeal is whether under the particular provision of BMA 66 applicable to this case and two other cases in litigation at the time of the passage of the Act, and especially in view of the unique factors applicable to this case which were considered by Congress in passing BMA 66, the Complaint was properly

dismissed by the District Court for failure to adequately plead a cause of action.

That Appellant has misconceived the precise and narrow issue involved in this case, distinguishing it from other bank merger cases decided by this Court, is shown by the fact that Appellant nowhere in its Jurisdictional Statement cites the section of BMA 66 which is expressly applicable to this case. This is Section 2 (c) of the Act and its significance will be discussed in the Argument.

We submit that considering the specific provisions of BMA 66 which are applicable to this case and the history of the Statute as well as of this case, the dismissal was proper and should be affirmed. If the Court should determine that the issues raised by this appeal are too substantial to be disposed of by a summary affirmance then this Appellee prays in the alternative that this appeal be set down for hearing to be fully briefed and argued.

ARGUMENT.

I.

This case is to be considered differently under BMA 66 than cases arising after the passage of the Act.

To understand the different treatment accorded this case by BMA 66 from cases arising after the enactment of that statute a brief history of the Act is necessary. After the Bank Merger Act of 1960 (12 U. S. C., § 1828) bank mergers required the prior approval of the applicable bank regulatory agency. In 1963 this Court in **United States v. Philadelphia National Bank**, 374 U. S. 321, held that even after such approval a bank merger could be attacked in court by the Department of Justice on the ground that such merger constituted a violation of the antitrust laws. It was held the prior approval of the agency did not immunize the merger.

Following this decision further Congressional action in regard to bank mergers was instituted which resulted ultimately in the passage of BMA 66. As discussed hereafter, it is clear that Congressional concern centered in two areas. First, it appeared that although the regulatory agency could approve a merger applying the several tests of the Bank Merger Act of 1960, the same merger could thereafter be attacked by the Department of Justice looking solely to the anti-competitive factors. Indeed a merger could be held invalid by the Courts on the anti-competitive factors alone without any consideration being given to the banking and public interest factors which the agency may have regarded as controlling.

The second area of concern was that if a bank merger were consummated and then held by the courts to constitute a violation of the antitrust laws the difficulties

foreseen in attempting a dissolution of the banks were enormous (See Section III of this Argument, *infra*). These difficulties faced not only the banks involved but also their customers and indeed the entire community served.

This Court has recently considered the effect of BMA 66 on mergers approved by the regulatory agencies after its passage. See **United States v. First City National Bank of Houston** (No. 914, O. T. 1966, decided March 27, 1967). There this Court held that the above two areas of concern had been met by the Act, first by assuring that the Department of Justice and the Courts would consider the banking and public interest factors which the Agency considered. Second, this Court held that the Congressional "abhorrence" of the difficulties of dissolution of merged banks had been avoided by the statutory stay of the consummation of any bank merger against which the Department of Justice filed suit within the required time.

However, there were six cases pending in the Courts when BMA 66 was passed. In each of the six cases the mergers had been consummated and two had already been held in violation of the antitrust laws. These cases required and were given special treatment in BMA 66. First, three of the cases, including the two which had been held in violation of the antitrust laws, were "forgiven". The stated reason was that they were consummated prior to this Court's **Philadelphia** decision. The other three cases, of which this is one, while not wholly exempted from prosecution were singled out for special treatment designed to assure, as far as was possible under the circumstances, that the safeguards and standards of BMA 66 would be applied.

The language and structure of BMA 66 clearly require this special treatment even though the Department of Justice has failed to recognize it, not even citing the par-

ticular section which makes BMA 66 applicable to this case.

The relevant Section, 2 (c) of BMA 66 provides as follows:

> "(c) Any court having pending before it on or after the date of enactment of this Act [Feb. 21, 1966] any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, **shall apply the substantive rule of law set forth in section 18 (c) (5)** of the Federal Deposit Insurance Act [subsec. (c) (5) of this section], as amended by this Act." (Emphasis added.) Section 2 (c) of Pub. L. 89-356.

This Section was not applicable and not considered by this Court in the **Houston** case. This Court there quoted and relied on the different language of Section 7 (B) of BMA 66 which applies only to cases following its enactment. (**Houston** case, *supra*, p. 5). Section 7 (B) of BMA 66 provides as follows:

> (B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of title 15, **the standards applied by the court shall be identical** with those that the banking agencies are directed to apply under paragraph (5)." (Emphasis added.) 12 U. S. C. 1828 (c) (7) (B) (1966 Supp.).

This Court was careful to explain in footnote 1 at page 8 of the **Houston** case that it was passing only on the procedural questions "treated in the opinion". Accordingly, the Department's reliance at page 7 of its Jurisdictional Statement on that case as a basis for summary disposition of this case is entirely erroneous.

It is clear that the Congress in using different language in Section 7 (B) to apply to future proposed mergers from that used in Section 2 (c) applicable to this case intended a different application of BMA 66 to the two kinds of cases. An examination of the language of the statute itself thus demonstrates that the **Houston** decision on the prospective procedural aspects of BMA 66 is inapplicable here.

The key differentiation is found in the use of the word "substantive" in Section 2 (c). This demonstrates that the pending cases were to receive the substantive benefits of the new standards set forth in Section c (5) of the Act, 12 U. S. C. 1828 (c) (5) (B) (1966 Supp.), while not being governed by the procedural aspects of the Act as enunciated by this Court in **Houston**. This is necessarily so because in the pending cases Agency consideration, Department of Justice action, hearings on preliminary injunctions, and even consummation of the mergers, had occurred under the procedures applicable prior to BMA 66.

Thus we have shown that under the language of the Act itself its applicability to this case is limited to its substantive standards and the **Houston** case is no guide as to the procedural requirements. In the subsequent sections of this argument we will demonstrate why the Appellant was required to plead that the benefits of this merger in the public interest did not outweigh its alleged anti-competitive effects.

The Department of Justice was afforded ample opportunity to correct its defective pleading under the Federal Rules of Civil Procedure applicable to this case, and it chose not to comply with the District Court's order.

II.

The Department of Justice has not fulfilled its duty to reconsider this action.

It is clear from the legislative history of BMA 66 that the standards set out in the Act, including a determination of whether the benefits of the merger in meeting the convenience and needs of the community to be served outweigh any anti-competitive effect, must, in cases instituted after its enactment, be considered by the Department of Justice before it brings suit. Thus, the report of the House Committee on Banking and Currency states:

> "(1) The bill would establish a single set of standards for the consideration of future mergers by the banking supervisory agencies, the Department of Justice, and the courts under the antitrust laws—standards stricter than those in the Bank Merger Act, but which include both the effect of the merger on competition and the convenience and needs of the community to be served; * * *" (H. R. Rep. No. 1221, 89th Cong., 2d Session (1966), p. 1).

Several House members in the debate on the bill pointed out this duty on the Department to consider the new standards prior to filing suit. For example, Representative Ottinger, one of the leading proponents of the bill, stated:

> "The bill provides uniformity in an area that had been chaotic. A single standard is provided for the regulatory agencies, the Attorney General and the courts where previously each had followed different standards" (Cong. Rec. 2-3-66, p. 2349).

Representative Stanton, another Committee member, stated:

> "Mr. Chairman, not only does this bill set forth a single set of bank merger standards for the super-

visory agencies, the Justice Department and the courts, it also gives these standards equal weight as between economic and competitive circumstances, and it assures this equilibrium through the entire review procedure" (Cong. Rec. 2-8-66, p. 2343).

Similar statements were made by Representatives Brock (p. 2337), Ashley (p. 2339), Moorhead (p. 2341), Halpern (p. 2342) and others.

That this was far more than a mere formal change insofar as the Department of Justice is concerned was clearly stated by Representative Multer, one of the ranking Committee members. He foresaw that the required recognition of the new standards by the Department would have marked effect in the future and, even more significantly for the present proceeding, that it would have made substantial changes had it been applicable in the past. He stated:

"In many of the cases, if not all of the cases, that thus far have reached the courts and have been tried, the Department of Justice view, narrowed to the sole matters of competition, has been sustained by the courts.

"If in the first instance, as is done here now, they had been required to take into account all of the factors, very few, if not most, of the cases that were brought would not have been brought, and if the court then had a right to determine the case in each instance that was before it on the basis of all the banking factors as well as competition, I have no doubt that many, if not all, of the decisions would have been contrary to the result as announced by the court.

"So what we do now is to say that all of these agencies shall take into account the same standards, the same factors, and arrive at their conclusion, and

in reviewing what the agencies have done, before determining whether or not the Department of Justice will take any of those matters to the court, the Department of Justice will also review all of the factors and determine whether or not on the whole case the matter should be brought to the court in order to prevent a violation of the Sherman Antitrust Act or the Clayton Act" (Cong. Rec. 2-8-66, p. 2336).

This case is a unique combination of the past and the future. Even if it be admitted for purposes of argument that when the case was brought the Justice Department's view "narrowed to the sole matters of competition * * *" was the appropriate one under the law as it then existed, nevertheless as to future cases BMA 66 requires that the Department take a broader view before filing suit. This case partakes of both positions since even if properly filed, BMA 66 specifically requires that its new substantive standards be followed herein, §2 (c) BMA 66.

In the unique posture of this case (as well as the other two "post Philadelphia" cases, which we mention below) this merger cannot be treated precisely the same as mergers for which agency approval is sought after the passage of BMA 66. One reason this is true is that the Department of Justice did not, and was not required to, consider the new standards of the Act prior to filing suit. However, this clearly cannot mean that this merger is to be denied the same treatment by the regulatory Agency and the Department of Justice as are future mergers. The Act says precisely that it will receive the same consideration.

In mergers considered after the passage of BMA 66, the Act provides that the Agency shall weigh the anticompetitive effects of the merger against its beneficial effect on the convenience and needs of the community.

As shown above, the Department of Justice is also required to consider the same effects.

The Comptroller, recognizing that the standards of the new act were made applicable to this merger, re-examined the entire matter in the light of the new standards. After so doing, the Comptroller issued a supplemental finding as set forth in the Jurisdictional Statement, p. 6.

However, there is nothing in the record before this Court which indicates in any way that the Department of Justice has recognized the additional duties imposed upon it by the new Act. As stated above, this Court has ruled in the **Houston** case that where suits are instituted against mergers which are consummated after the passage of BMA 66 a violation of BMA 66 need not be specifically pleaded. Thus the Court presumes that the Department will fulfill its duties under the Act prior to institution of suit. However, where, as here, it is known that no consideration was given to the convenience and needs factors prior to suit, it must be shown that the Department has recognized the new standards. Since we have shown that only the substantive standards of the new Act apply here, we submit that to carry its burden under the peculiar circumstances of this case, the Department was required to plead that the probable beneficial effects of the merger on the convenience and needs of the community do not outweigh the pleaded anti-competitive effects.

The above discussion goes to the question of whether the Department must in this case plead, in effect, a violation of the standards of BMA 66. It should be noted that the Jurisdictional Statement filed by the Department erroneously states that the District Court's ruling requires that the "government establish • • • that the adverse effects of a challenged merger are not clearly outweighed by considerations of community convenience and needs" (Emphasis added). Jurisdictional Statement, pp.

6, 7. The ruling does not so require. It requires only that the Department in this case, must plead that the anti-competitive effects are not outweighed by the convenience and needs of the community.

As pointed out above, the history as well as the language of BMA 66 requires that as to this case, in the unique position of being pending at the time of its passage but not specifically exempted by it, the Department of Justice must reconsider its actions under the standards of the new act. There could seem to be little dispute that the Department should be required to acknowledge by its pleadings that it has performed this requirement.

III.

The duty of the Department of Justice to consider and plead the standards of BMA 66 in this case is not merely formal, but is substantial.

A. The basic purpose of BMA 66 is to avoid divestiture.

The above discussion clearly shows Congressional concern that all bank mergers within the terms of BMA 66, including the three post-Philadelphia cases, receive the thorough consideration of the Department of Justice under its new standards. Under the decision of this Court in the Houston case as to mergers approved after the passage of BMA 66, the statutory stay will remain in effect until the case is fully tried. Thus in the future, consideration of all provisions of BMA 66 will be given prior to the consummation of all mergers, not only by the Agency but also by the Department and by the Courts.

This Congressional aim will not be met in this case unless the order of the District Court in this case is permitted to stand. Pursuant to the law applicable at the time, the merger of Mercantile and Security was

consummated on July 14, 1965. In view of this status it is necessary to consider the prime factor that motivated Congress in passing BMA 66, that is, the elimination of the vexing problem of attempting to dissolve merged banks. That this was the primary purpose of the Act cannot be doubted. Representative Wright Patman, Chairman of the House Committee on Banking and Currency which reported the bill that was finally enacted, stated (Cong. Rec. 2-8-66, p. 2333):

> "The major purpose of this bill is to provide a single standard for the approval and adjudication of bank mergers prior to their consummation. Thus the bill avoids the difficulties of unscrambling bank assets" (Emphasis added).

This concern is conclusively demonstrated by the title of BMA 66: "A Bill to establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks, and for other purposes."

This Court recently recognized that Congress "abhorred" the unscrambling process in the case of banks. **United States v. First City National Bank of Houston** (No. 914, O. T. 1966, at p. 10). In that case this Court also stated at p. 9:

> "The legislative history is replete with references to the difficulty of unscrambling two or more banks after their merger." (Emphasis the Court's).

In Footnote 2 of the **Houston** case is outlined some of the testimony on this matter that was before Congress when it considered BMA 66:

> "The Chairman of the Federal Reserve System testified in the hearings that preceded enactment of the Bank Merger Act of 1966 that '[a] Federal court order cannot recreate the two banks that formerly ex-

isted . . . No matter how one may feel about whether the merger should have taken place in the first instance, there is no turning back. To unscramble the resulting bank clearly poses serious problems not only for the banks but for its customers and for the community.' Hearings on S. 1698 and related bills before the Subcommittee on Domestic Finance of the House Committee on Banking and Currency, 89th Cong., 1st Sess., 11. The president of the American Bankers Association declared that '"unmerging" a bank after the two banks have operated as a single unit is nightmarish even in the abstract.' Hearings on S. 1698 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 1st Sess., 63. Senator Robertson stated, '[y]ou are dealing with a physical impossibility,' and 'the community gets hurt,' when divestiture is attempted in a bank merger case. *Id.*, at 4. Senator Proxmire spoke of 'the agony and the inequity and the financial loss, disruption of the economy in the community of being required . . . to unscramble.' *Id.*, at 202" United States v. First City National Bank of Houston (No. 914, O. T. 1966, at p. 9).

In the debate on the bill in the House, Congressman Halpern stated:

". . . If grave doubts are to be raised about the legality of a merger, it is at this time—before consummation—that they should be voiced. For it is difficult to exaggerate the hardship entailed in endeavoring to unscramble a merger, and this is particularly unfortunate when the parties were acting in the utmost of good faith, on advice of competent counsel." (Cong. Rec. 2-8-66, p. 2342).

More will be said in regard to the latter part of this statement *infra*.

Also during the debates Congressman Multer said:

> "Even the Department of Justice cannot come up with a formula under which they can divest. I think what we are doing here is not only relieving the courts of a lot of litigation but relieving the Department of Justice of a burden which it just cannot carry." (Cong. Rec. 2-8-66, p. 2358).

Both Congress and this Court have recognised that any attempt to cause a dissolution of banks after merger is not only actually impossible of practical accomplishment but totally disruptive to the banks, their customers and indeed to the entire community. Accordingly, since in this case where the primary safeguard of BMA 66, that is consideration of banking and public interest factors by the Agency, the Department and the Courts, prior to merger, cannot be applied, all other requirements of the Congress must be even more assiduously followed. Indeed it would be patently contrary to legislative intent to permit the Department of Justice to pursue a divestiture with its disastrous consequences to the public interest of the community when the record clearly shows that the Department has not carried out the legislative mandate to weigh the community benefits of the merger against any alleged anti-competitive effects. As to merged banks, a part of the weighing of public interest is surely to consider the disruptive consequences to the community of divestiture as a factor weighing against the anti-competitive effects.

B. The Mercantile-Security merger was consummated in good faith reliance upon the publicly announced policy of the Department of Justice.

Finally and, we believe, conclusively there is a feature applicable alone to this case arising out of its commencement by the Department of Justice that requires an affirmance of the order of dismissal. The discussion of this

issue requires a brief review of the history of the merger and the action of the Department in filing this action.

We note parenthetically that there was much discussion in Congress about the good faith of the three pre-Philadelphia mergers which were excused by the Act from further antitrust litigation. It was further recognized in the legislative history that the aspect of fair play and good faith present in the merger in this case required a different consideration of it even as compared to the other two post-Philadelphia mergers which are otherwise in some respects similar to this one.

There can be no serious question that the decision of Mercantile and Security to merge was made in good faith and in reliance upon the publicly announced policy of the Antitrust Division that the Department would not file suit against a bank merger unless two of the three banking regulatory agencies agreed with the Department that the anti-competitive effects of such a merger outweighed its beneficial effects (Record of Preliminary Hearing, pp. 30-31, 139-140). The then head of the Antitrust Division made the following statement before the United States Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary on April 21, 1965, (Defts.' Exh. X-1) prior to the adoption of the merger agreement by the two banks:

> "As I have stated, our enforcement policy and practice contemplates that we will not today, bring suits to enjoin bank mergers unless two of the other three agencies agreed with us that the anticompetitive effects outweighed what other advantages the merger might have. And this is our present policy." (As amended by letter of May 14, 1965, to Senator Hart; Pltf's. Exh. 8).

Not only were there not two agencies which found that the anti-competitive effects of the merger outweighed

the public interest factors involved, none of the regulatory agencies so found. Two of the three banking agencies concluded in their reports that the merger would not have any significant anti-competitive effect. The Federal Deposit Insurance Corporation concluded (Record of Preliminary Hearing, Pltf's. Exh. 1):

> "* * * consideration has been given to the elements of competition involved and, without regard to the banking factors which may be of paramount importance in this proposal, the Board of Directors has concluded there will be some diminution of competition in downtown St. Louis but that there would be no significant effect on competition either in downtown St. Louis or in the regional service area of Mercantile."

The Comptroller of the Currency, finding the merger to be in the public interest, approved it effective June 30, 1965 (Record of Preliminary Hearing, Defts.' Exh. K).

While the report of the Board of Governors of the Federal Reserve System concluded that the effect of the merger on competition would be adverse, the report does not say that the anti-competitive effects outweigh the other advantages of the merger to the public (Record of Preliminary Hearing, Pltf's. Exh. 1).

Representative Wright Patman, Chairman of the Committee on Banking and Currency, submitted the report of the Committee containing the following comment on this case in a section dealing with "Pending Cases" (H. R. Rep. No. 1221, 89th Cong., 2d Session (1966), p. 5):

> "Before leaving this subject, however, your committee wishes to express its deep concern over the manner in which at least one of the post-Philadelphia cases has been handled by the Department of Justice. The facts are set forth in the supplemental views

filed herewith by the Honorable Leonor K. Sullivan" (Emphasis added).

Representative Sullivan's supplemental views pointed out that the Mercantile-Security merger was consummated in reliance on the announced policy of the Department of Justice. Representative Sullivan concluded that further action against this merger should be discontinued, saying in this regard:

> "As the committee report points out the Justice Department is proceeding against three other banks which merged after June 17, 1963. These banks would not be relieved of the pending antitrust proceedings against them under the committee's bill on the theory that they merged with full knowledge of the effect of the Supreme Court's decision on their situations and thus do not have the same good faith basis for relief as do the three pre-decision banks. Based on the facts before the committee at the time I do not quarrel with this conclusion. However, it has subsequently developed that at least one of the post-decision mergers was planned and carried forward only because the parties relied in good faith on statements made by responsible officials of the Justice Department.
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> "On the facts, I think that the banks involved had a good faith basis for proceeding with plans to merge and for merging. Thus, I would put in the law as a basis for stopping further antitrust proceedings the policy statement made both privately and publicly by the then head of the Antitrust Division of the Department of Justice, and upon which one or more banks relied in good faith in proceeding to merge" (H. R. Rep. No. 1221, 89th Cong., 2nd Session (1966), pp. 25-26).

The filing of the suit in St. Louis, notwithstanding the publicly announced policy of the Antitrust Division, prompted Senator A. Willis Robertson to make the following comment on the floor of the Senate in the course of the debate on BMA 66:

> "In connection with the merger which occurred in the State of my distinguished friend from Missouri [Senator Long], it appears to me that the Department of Justice might well reexamine its decision to bring this suit, particularly in the light of the new standards provided in the bill for judging the propriety of bank mergers. In the House committee report, which I obtained unanimous consent to have printed in the Record yesterday for the information of the Senate, the committee expressed its deep concern over the manner in which that case was handled. The facts which caused the committee to express its concern are set forth in detail in the supplemental views of the Congressman from Missouri. I share that concern" (Cong. Rec. Feb. 9, 1966, p. 2551).

In the face of the specific requirement of BMA 66 and of the directions of members of Congress and the House Committee report, the Department of Justice should not be permitted to continue this litigation since it failed to specifically find and plead that in this particular case the merger violated the standards of BMA 66.

CONCLUSION.

In the particular circumstances of this case, unlike those cases which arose or will arise after the enactment of BMA 66 (the rules as to which this Court found in the Houston case) the Department of Justice is required to plead that the anti-competitive effects it alleged were not outweighed in the public interest by the merger's value in meeting the convenience and needs of the community.

This requirement is found not only in the particular language of the statute applicable only to the three post-Philadelphia cases pending at its passage, but also in the history of the legislation and of the commencement of this suit.

Accordingly, Appellee prays that the order of the District Court dismissing the Complaint be affirmed. If this Court concludes that the issues raised on this appeal are too substantial to be disposed of by a summary affirmance, then, in the alternative, Appellee prays that this appeal be set down for hearing to be fully briefed and argued.

Respectfully submitted,

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May 11, 1967.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1269

UNITED STATES OF AMERICA, APPELLANT

v.

MERCANTILE TRUST COMPANY NATIONAL ASSOCIATION, SECURITY TRUST COMPANY, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF OPPOSING MOTION TO AFFIRM

In their motion to affirm, appellees contend that their merger "was consummated in good faith reliance upon the publicly announced policy of the Department of Justice" (p. 15). While their contention is not directly related to the merits of this appeal, we deem it appropriate to note that it is, in any event, unfounded.

Appellants were on notice of the government's view that the merger was illegal before it was consummated. The complaint challenging the merger was filed on July 7, 1965. The government's request for a preliminary injunction was denied on July 14, 1965, at 4:30 p.m.

284-590—67

and the merger was consummated a half hour later. Thus, the merger was consummated with full knowledge that the government believed it to be illegal.

The "policy statement" upon which the banks claim to rely was testimony of the Assistant Attorney General in Charge of the Antitrust Division before a congressional committee to the effect that a bank merger would normally not be challenged unless two of the three federal banking agencies agreed that the merger was bad. He never suggested that this was an inflexible rule, to be followed in every case regardless of circumstances. On the contrary, on May 14, 1965, three and a half weeks after he had testified, he expressly stated in a letter to the chairman of the committee:

> I should like to add that what I said about the impact of banking agency merger reports on antitrust action was intended only to emphasize the substantial weight that I believe should be given to these reports in our deliberations. I do not believe that such reports could ever relieve the Department of Justice from exercising its own enforcement discretion in what it deems to be the public interest, and to avoid any possible misinterpretation of my remarks, I would appreciate your including this statement in the record of the hearings. [*Economic Concentration*, Report of Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, pursuant to S. Res. No. 40, 89th Cong., 1st Sess., Pt. 2, p. 880 (1965).]

At all events, it is plain that appellants did not, in fact, rely on the "policy statement" in planning, agree-

ing to, or consummating the merger. The statement was made on April 21, 1965, and preparations to merge had already been made by that date. Moreover, the merger agreement was signed on April 29, before an application for permission to merge was filed with the Comptroller of the Currency on April 30, and thus before the other banking agencies could have expressed their views and the banks could have known whether two of them would concur in the view of the Department of Justice. Finally, any uncertainty as to the government's position on the legality of the merger was removed when the government, well in advance of consummation, filed its complaint and asked for a preliminary injunction restraining consummation.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

UNITED STATES *v.* MERCANTILE TRUST CO. NATIONAL ASSOCIATION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 87. Decided October 16, 1967.

PER CURIAM.

The judgment is reversed and the case is remanded for further proceedings consistent with the opinion of this Court in *United States* v. *First City National Bank of Houston*, 386 U. S. 361.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.